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No.

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IN THE

Supreme Court of The United States

OCTOBER TERM, 1980

JACQUELYN M. CHAGNON, *et al.*,

Petitioners,

v.

GRIFFIN BELL, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether government officials who conducted a 268 day warrantless wiretap on the telephone of a suspected foreign agent in 1977 and 1978 should have known that the Fourth Amendment required them to minimize the interception of conversations of innocent United States citizens with the suspected agent.

2. Whether government officials should have known in 1977 and 1978 that the Fourth Amendment required them to obtain a warrant for a wiretap on the home telephone of a suspected foreign agent (a) at the initiation of the surveillance when its primary purpose was to obtain intelligence, and (b) when the primary purpose of the surveillance subsequently shifted to obtaining evidence for a criminal prosecution.

3. Whether in a damage action against government officials a district court may stay plaintiffs' discovery and grant summary judgment to the officials on the basis of qualified official immunity when material facts are in dispute and relevant evidence is solely within defendants' possession.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners respectfully seek a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.[1]

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, *infra,* 1a-35a) is not yet reported. The opinion of the District Court (Appendix C, *infra,* 37a-49a) is reported at 468 F. Supp. 927. The District Court's order staying discovery (Appendix E, *infra,* 51a) is unreported.

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[1]Petitioners are Jacquelyn M. Chagnon, Roger E. Rumpf, Beverly J. Chagnon, and John F. Kelly. Respondents are Griffin Bell, Clarence M. Kelly, Richard Held, and William Fleshman.

JURISDICTION

The judgment of the Court of Appeals was entered on August 14, 1980. (Appendix B, *infra*, 36a.) On November 6, 1980 the Chief Justice extended the time for filing a petition for certiorari to and including December 12, 1980. On December 3, 1980, the Chief Justice further extended the time for filing a petition for certiorari to and including January 11, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourth Amendment to the United States Constitution and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520. The Amendment and the pertinent provisions of Title III are set out in Appendix F, *infra*, 52a-55a.

STATEMENT OF THE CASE

The four petitioners in this case seek damages from respondents to redress the interception, transcription, and dissemination of a great number of their telephone conversations with a suspected foreign agent during a 268 day warrantless wiretap on the agent's home telephone in the District of Columbia. On May 9, 1977, respondent Bell, then the Attorney General, authorized the wiretap on the home telephone of Truong Dinh Hung, a Vietnamese national, who resided in the District of Columbia and was suspected of passing classified State Department documents to Vietnamese authorities in Paris. The FBI began the wiretap on May 11, 1977. In August and November 1977, respondent Bell renewed his authorization of the warrantless surveillance, and it continued until

January 31, 1978, when Truong and Ronald C. Humphrey, an alleged accomplice, were indicted for espionage and related crimes by a Grand Jury in the Eastern District of Virginia.

Following public disclosure of the Truong wiretap, petitioners filed suit against the Attorney General and three FBI officials who were responsible for the wiretap. Petitioners asserted in their complaint that they are friends of Mr. Truong and that throughout the period of the surveillance they had numerous conversations with him over his telephone. All of these conversations were intercepted, recorded, transcribed and disseminated within the government by respondents and their agents.[2] Petitioners alleged that none of their conversations with Truong related to foreign intelligence matters or any criminal activity but consisted of personal and political discussions. Accordingly, petitioners sought money damages for violations of their rights under the Fourth Amendment and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520.

Shortly after filing their complaint, petitioners requested production of documents relating to the Truong surveillance. They also noticed the deposition of respondent Bell, although they indicated that they were willing to postpone this deposition until after the documentary evidence had been produced and analyzed. Respondents then moved for a stay of all discovery and

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[2]Every conversation on Truong's telephone, with possibly one exception, was monitored and virtually all were taped. *United States* v. *Truong*, 629 F.2d 908, 912 (4th Cir. 1980); *United States* v. *Humphrey*, 456 F. Supp. 51, 60 n.8 (E.D. Va. 1978). The fact that petitioners' conversations were intercepted, recorded, transcribed and disseminated was also established by the affidavit of Mr. Truong's defense attorney who is familiar with the records of the surveillance.

moved for summary judgment on the ground that they were entitled to qualified official immunity. (App. 10a-11a.)[3] The District Court promptly granted the motion to stay discovery. (App. 51a.) In support of their dispositive motion, respondents relied on respondent Bell's affidavit submitted in connection with the suppression hearing in the Truong-Humphrey trial, his testimony at that hearing, and the opinion of the United States District Court for the Eastern District of Virginia on the motion to suppress the fruits of the surveillance. *United States* v. *Humphrey,* 456 Supp. 51 (E.D. Va. 1978).

The trial judge in the criminal case – who, unlike any of the judges in the instant litigation, reviewed all the records of the Truong wiretap – concluded that "at the time of its initiation, the surveillance in this case was undertaken for the primary, or even sole, purpose of foreign intelligence gathering." *Id.* at 58. However, the Court was "not convinced that the primary purpose of the surveillance remained foreign intelligence gathering throughout the life of the surveillance." *Id.* at 58-59. Not only did the Department of Justice give gradually increasing consideration to prosecution, but also "Attorney General Bell's affidavit shows that little, if anything, in the way of new foreign intelligence came to light after June [1977]." *Id.* at 59. Thus, the Court concluded that by July 20, 1977, the primary focus of the investigation had shifted from intelligence gathering to obtaining evidence for a criminal prosecution. *Id.* Since no warrant was obtained at that point, the Court suppressed all evidence gathered thereafter. *Id.*

The District Court in the criminal case also considered the question of whether the wiretap complied with the

[3]Respondents asserted additional grounds for dismissal on which neither the District Court nor the Court of Appeals relied.

reasonableness requirement of the Fourth Amendment and concluded that with respect to the initial period between May 11 and July 20, 1977, the surveillance was reasonable:

> An investigation such as this one may take a considerable amount of time. Code names may be utilized, and apparently innocuous conversations may, upon expert examination, reveal a more sinister context. It is difficult to see how, absent a blanket interception for a reasonable period of time, the government could assure itself that all the actors in an espionage ring had been identified.

Id. at 60.

However, with respect to the remaining 197 days of the surveillance the Court stated that "it is hard . . . to conceive that by July 20, 1977, after a blanket interception of over eighty [sic] days, the participants could not have been identified, and at least some greater selectivity exercised, even if necessity for the surveillance continued." *Id.* For this reason, the Court found that the warrantless wiretap became unreasonable after July 20, 1977. *Id.*[4]

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[4]Mr. Humphrey's attorneys – who had the opportunity to review the surveillance transcripts as petitioners have not – provided the following description of the nature of the conversations intercepted in the last month of the surveillance:

> Seizures of communications, in January 1978 alone included, among other things, such "foreign intelligence" topics as: Thanksgiving dinner past, poker, the meaning and operation of W-2 and withholding taxes, the weather lady, whether Duddington's Restaurant on Pennsylvania Avenue is the best in that area, whether one John Kelley [a petitioner herein] can get his Ph.D. from Harvard without paying back tuition, the hard times of Mrs. Kien (a short-order cook), John Kelley's haircut and sartorial habits, and

Relying solely on the record developed in the criminal case, the District Court in the instant case ruled that respondents are entitled to qualified official immunity because the record supported a finding that the Attorney General subjectively believed in the legality of the surveillance and that the wiretap had violated no clearly established constitutional right. (App. 44a - 47a.) The Court of Appeals affirmed this ruling. (App. 15a - 33a.) The Court of Appeals also held that the District Court had not abused its discretion in preventing petitioners from taking any discovery (App. 33a-34a) even though the Court ruled that some of their claims failed for lack of proof. (App. 28a-33a.)

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS AN IMPORTANT QUESTION CONCERNING THE DUTY OF GOVERNMENT OFFICIALS TO MINIMIZE THE INTERCEPTION OF CONVERSATIONS OF INNOCENT CITIZENS IN THE COURSE OF ELECTRONIC SURVEILLANCE OF SUSPECTED FOREIGN AGENTS.

The Court of Appeals held that respondents violated no clearly established constitutional standard by failing to take any steps to minimize the interception of petitioners' conversations during the 268 day wiretap of a suspected

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> assorted other personal items. In addition to these more mundane topics, the January interceptions include voluminous intrusions upon serious discussions of political events, current affairs and other matters bearing absolutely no relationship to the espionage investigation that the FBI had, for the past nine months, been conducting.

Memorandum in Support of Motion to Suppress Electronic Surveillance Seizures, 34-35. *United States* v. *Humphrey*, Crim. No. 78-24-A (E.D. Va.). Petitioners brought this representation to the attention of the District Court in the instant case.

foreign agent. This ruling is erroneous with respect to the state of the law at the time of the wiretap and casts serious doubt on the efficacy of the minimization provisions of the subsequently enacted Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. § 1801 *et seq.* (effective Oct. 25, 1978).

This Court has repeatedly held that in damage suits against government officials alleging violations of constitutional rights, qualified immunity is unavailable if "the constitutional right allegedly infringed by [defendants] was clearly established at the time of their challenged conduct, if they knew or should have known of that right, and if they knew or should have known that their conduct violated the constitutional norm." *Procunier* v. *Navarrette,* 434 U.S. 555, 562 (1978). *Accord, Butz* v. *Economou,* 438 U.S. 478, 498 (1978); *Wood* v. *Strickland,* 420 U.S. 308, 322 (1975); *Scheuer* v. *Rhodes,* 416 U.S. 232, 247-248 (1974).[5] In 1967, the Court held that the Fourth Amendment protects the privacy of telephone conversations from electronic surveillance. *Katz* v. *United States,* 389 U.S. 347. Although *Katz* left open the applicability of the warrant requirement to national security wiretaps, 389 U.S. at 358 n.23, that decision clearly

[5]Qualified immunity is also unavailable if the defendant official acted with bad faith, an improper motive, a deliberate intention to injure the plaintiff, or with reckless disregard for the plaintiff's interests. *Gomez* v. *Toledo,* 100 S. Ct. 1920, 1924 (1980); *Procunier* v. *Navarette, supra,* 434 U.S. at 561-562; *Wood* v. *Strickland, supra,* 420 U.S. at 322; *Scheuer* v. *Rhodes, supra,* 416 U.S. at 247-248.

established the applicability of the Fourth Amendment's reasonableness requirement to all wiretapping.[6]

The elements of Fourth Amendment reasonableness also had been clearly spelled out prior to 1977 in decisions delineating permissible procedures for the conduct of electronic surveillance. In *Berger* v. *New York,* 388 U.S. 41, 59 (1967), this Court held that in order for a surveillance to be reasonable, it must be aimed at specific communications relevant to the investigation and not be "a roving commission to 'seize' any and all conversations." The surveillance must be minimized to avoid interception of non-pertinent conversations of the target and conversations of other persons unrelated to the investigation. *See Katz* v. *United States, supra,* 389 U.S. at 354-357; *Osborn* v. *United States,* 385 U.S. 323, 329-330 (1966). Indeed, in 1976, the District Court for the District of Columbia – where the instant wiretap took place – explicitly held that the reasonableness requirement of the Fourth Amendment requires minimization of non-pertinent conversations in national security wiretaps. *Halperin* v. *Kissinger,* 424 F. Supp. 838, 842-843 (D.D.C. 1976), *aff'd,* 606 F.2d 1192 (D.C. Cir. 1979), *cert. granted,* 100 S. Ct. 2915 (1980),

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[6]The Fourth Amendment contains "two separate clauses, the first protecting the basic right to be free from unreasonable searches and seizures and the second requiring that warrants be particular and supported by probable cause." *Payton* v. *New York,* 100 S. Ct. 1371, 1379 (1980). It has long been recognized that "[t]he general right of security from unreasonable search and seizure was given a sanction of its own and the amendment thus intentionally given a broader scope. That the prohibition against 'unreasonable searches' was intended, accordingly, to cover something other than the form of the warrant is a question no longer left to implication to be derived from the phraseology of the Amendment." *Id.* at 1379 n. 23, *quoting* Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 103 (1937).

No. 79-880 (*argued* Dec. 8, 1980). *See Zweibon* v. *Mitchell,* 606 F.2d 1172, 1177 (D.C. Cir. 1979), *petitions for cert. pending,* Nos. 79-881, 79-883 (*filed* Dec. 7, 1979). Thus respondents were clearly on notice of the duty to minimize.

To be sure, the extent of minimization required by the Fourth Amendment may vary depending on the circumstances of the surveillance. *Scott* v. *United States,* 436 U.S. 128 (1978); *United States* v. *United States District Court,* 407 U.S. 297, 320 (1972). Here, however, respondents made no effort whatsoever to minimize the interception of petitioners' conversations. Furthermore, the District Court in the criminal case, on the basis of its examination of the surveillance records, found that "it is hard . . . to conceive that by July 20, 1977, after a blanket interception of over eighty days, [sic] the participants [in the espionage ring] could not have been identified, and at least some greater selectivity exercised, even if necessity for the surveillance continued." *United States* v. *Humphrey, supra,* 456 F. Supp. at 60. That Court also found that "little, if anything, in the way of new foreign intelligence came to light after June." *Id.* at 59. Indeed, during the final month of the surveillance, long after the expiration of any reasonable period of time necessary to identify co-conspirators or the use of codes, the intercepted conversations concerned plainly personal matters wholly unrelated to the espionage investigation. *See* n.4, *supra.*

This case therefore presents a serious error in the interpretation of constitutional law that has deprived petitioners of an opportunity to seek redress for the violation of their Fourth Amendment rights. Damage actions such as this one have been viewed with favor by this Court as an important means of vindicating constitutional guarantees.

Carlson v. *Green*, 100 S. Ct. 1468, 1473 (1980); *Butz* v. *Economou, supra*, 438 U.S. at 504-506; *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 392 (1971). Thus, the interests at stake merit this Court's review.

This case also presents an issue of wider applicability than the petitioners' individual interests – the nature of the minimization procedures required by the Foreign Intelligence Surveillance Act of 1978 (FISA). That statute, which was passed after the instant wiretap was terminated, 50 U.S.C. § 1801 (note), prescribes procedures and standards for obtaining judicial warrants for electronic surveillance of foreign agents. In particular, the statute requires the use of minimization procedures. 50 U.S.C. §§ 1804, 1805. However, the statute does not specifically define what procedures are necessary. Instead, it directs the Attorney General to adopt procedures "that are reasonably designed in light of the purpose and technique of the particular surveillance, to minimize the acquisition and retention, and prohibit the dissemination of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information." 50 U.S.C. § 1801 (h)(1).

Thus, FISA does not indicate what minimization procedures are required with any significantly greater specificity than does the Fourth Amendment. Accordingly, under this statutory scheme, development of minimization procedures in foreign agent surveillances will depend on continued judicial interpretation of what the Fourth Amendment reasonableness standard requires. By holding that the absence of any minimization in a 268 day wiretap satisfied the Fourth Amendment, the decision below sets a standard that threatens to eviscerate the minimization pro-

visions of FISA. Accordingly, the decision has the potential for broad prospective effect which merits this Court's review.

II. THIS CASE PRESENTS IMPORTANT QUESTIONS CONCERNING THE APPLICABILITY OF THE FOURTH AMENDMENT'S WARRANT REQUIREMENT TO ELECTRONIC SURVEILLANCE OF SUSPECTED FOREIGN AGENTS.

The District Court in the criminal case found that "at the time of its initiation, the surveillance in this case was undertaken for the primary, or even sole, purpose of foreign intelligence gathering" but that after the first seventy days, the primary focus of the investigation shifted from intelligence gathering to gathering evidence for a criminal prosecution. *United States* v. *Humphrey, supra,* 456 F. Supp. at 58-59. The Court of Appeals in the instant case held that respondents need not have known that the Fourth Amendment required a warrant for this wiretap either at the outset of the surveillance or when its primary focus became prosecution. These rulings are in error and merit this Court's review because of their adverse impact on petitioners' ability to seek compensation for invasions of their Fourth Amendment rights.

It is abundantly clear that respondents should have known in 1977 that a warrant was required once the primary focus of their investigation became criminal prosecution. In 1974, the Third Circuit Court of Appeals held that there is a foreign agent exception to the Fourth Amendment warrant requirement only when the primary purpose of the surveillance is intelligence gathering. *United States* v. *Butenko,* 494 F.2d 593, 606 (3d Cir.) (*en banc*), *cert. denied,* 419 U.S. 881 (1974). Furthermore, the District of Columbia Circuit has held that Title III has always required a warrant for electronic surveillance which does not involve "the primary purpose of protecting

national security information against foreign intelligence activities." *Halperin* v. *Kissinger, supra,* 606 F.2d at 1205.[7] Indeed, Title III specifically contemplates that warrants will be obtained in espionage cases. 18 U.S.C. § 2516 (1)(a). Since the Court in the criminal case found that a shift from intelligence gathering to prosecution clearly had taken place by July 20, 1977 and that "little if anything, in the way of new foreign intelligence came to light after June [1977]," 456 F. Supp. at 59, respondents violated a clearly established legal standard of which they should have known.[8] Accordingly, the Court of Appeals erred in ruling that respondents were entitled to qualified immunity for their failure to obtain a warrant after the initial period of the surveillance.

With respect to the initial period of the wiretap, respondents should have known that a warrant was required in the District of Columbia, if not elsewhere. In 1975 a plurality of the Court of Appeals for that circuit stated that a warrant is required for all national security wiretaps, absent exigent circumstances. *Zweibon* v. *Mitchell,* 516 F.2d 594, 651 (D.C. Cir. 1975) (*en banc*), *cert. denied,* 425 U.S. 944 (1976) (*Zweibon I*). Although that case involved a domestic organization which was not the agent of a foreign power and the explicit holding was so limited, 516 F.2d at 614, the opinion nonetheless conclud-

[7]The government did not seek review of this ruling in *Kissinger* v. *Halperin,* No. 79-880. *See* Petition for Certiorari, 10 n.8; Brief for Petitioners, 10 n.16.

[8]Appellate decisions which have recognized the existence of a foreign agent exception to the Fourth Amendment warrant requirement did not involve wiretaps which appear to have been conducted for the primary purpose of developing evidence for a criminal prosecution. *United States* v. *Buck,* 548 F.2d 871 (9th Cir.), *cert. denied,* 434 U.S. 890 (1977); *United States* v. *Brown,* 484 F.2d 418 (5th Cir. 1973), *cert. denied,* 415 U.S. 960 (1974); *United States* v. *Clay,* 430 F.2d 165 (5th Cir. 1970), *rev'd on other grounds,* 403 U.S. 698 (1971).

ed that "absent exigent circumstances, *no* wiretapping in the area of foreign affairs should be exempt from prior judicial scrutiny, irrespective of the justification for the surveillance or the importance of the information sought." *Id.* at 651 (emphasis in original).

This was not off-handed dicta but the result of a detailed and comprehensive analysis of the Fourth Amendment and the arguments for warrantless surveillance. *Zweibon I, supra,* 516 F.2d 628-651. Moreover, that analysis was faithfully patterned on this Court's Fourth Amendment analysis in *United States* v. *United States District Court,* 407 U.S. 297 (1972), which had held that warrants are required for internal security wiretaps. The court of appeals in *Zweibon I* provided its extended discussion of when warrants are required for the express "purpose of informing both the Executive Branch and members of the judiciary of some of the considerations which should guide their actions in the future." 516 F.2d at 655. The opinion plainly did not avoid or reserve the foreign agent question. Instead *Zweibon I* represented an authoritative statement of the law which respondents were obliged to follow, at least in the District of Columbia. Consequently, their failure to obtain a warrant at the outset of the Truong surveillance violated principles of which they should have known and deprives them of qualified immunity.

III. THIS CASE PRESENTS IMPORTANT ISSUES WITH RESPECT TO THE APPROPRIATE EXENT OF DISCOVERY AND APPLICATION OF SUMMARY JUDGMENT PROCEDURES IN CASES INVOLVING THE QUALIFIED IMMUNITY DEFENSE.

In *Butz* v. *Economou, supra,* 438 U.S. at 508, the Court stated that "damages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based

on the defense of immunity. . . . In responding to such a motion, plaintiffs may not play dog in the manger; and firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits." (footnote and citation omitted). The District of Columbia Circuit has observed that the question of effective use of summary procedures in properly balancing the interests of plaintiffs and defendants is "the central problem posed by the post-*Economou* immunity doctrine." *Halperin* v. *Kissinger, supra,* 606 F.2d at 1210 n. 121, and other courts have wrestled with this problem. *See id.* at 1214-1215 (Gesell, J. concurring); *Mariorana* v. *MacDonald,* 596 F.2d 1072, 1076-1077 (1st Cir. 1979); *Harper* v. *Miller,* 491 F. Supp. 217, 218-219 (D.D.C. 1980); *Logiurato* v. *Action,* 490 F. Supp. 84, 91-92 (D.D.C. 1980); *Harper* v. *Blumenthal,* 478 F. Supp. 176, 184 (D.D.C. 1979). The instant case is an example of misapplication of summary procedures and presents an appropriate opportunity for this Court to provide further guidance on this important issue.

The record on which respondents based their motion for summary judgment consisted solely of respondent Bell's testimony at the suppression hearing in the criminal case, his affidavit submitted in that proceeding, and the Virginia District Court's decision. When petitioners noticed respondent Bell's deposition and sought production of the records of the surveillance pursuant to Rule 34, Fed. R. Civ. P., the District Court stayed all discovery.[9] The court then granted respondents' motion for summary judgment, notwithstanding petitioners' contentions that factual issues were in dispute, Rule 56(c), Fed. R. Civ. P., and that facts relevant to their case were solely within respondents' possession. Rule 56(f), Fed. R. Civ. P.

[9]The records were not otherwise available to petitioners because the District Court in the criminal case had placed them under a protective order.

The principal factual disputes concern the subjective element of the qualified immunity defense. In order to prevail under this affirmative defense, officials must not only demonstrate that they violated no clearly established law, but also that they acted in good faith without an improper motive, a deliberate intention to injure respondents, or a reckless disregard for respondents' interests. *See* n. 5, *supra.* Petitioners asserted that respondents had been reckless in their failure to minimize the interception of petitioners' conversations and in their disregard for the teaching of *Zweibon I* that warrants are required for all wiretaps, absent exigent circumstances, and the record from the criminal cases raises questions that should have precluded summary judgment. *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144 (1970); *United States* v. *Diebold Inc.*, 369 U.S. 654 (1963); *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962).[10]

Moreover, the stay of discovery prevented petitioners from further developing their claims or testing

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[10]The calls intercepted in the last month of the surveillance, *see* n.4, *supra,* certainly can be characterized as reckless interceptions. Furthermore, respondent Bell stated in his testimony that he was aware of the minimization requirement. Why then was it not applied in this case? Was the failure to do so intentional and reckless? Such questions plainly preclude summary judgment with respect to the subjective aspect of the qualified immunity defense. Furthermore, the record is not sufficiently clear to support an award of summary judgment on the question of whether respondents' failure to obtain a warrant for the Truong wiretap was reckless or based on a sincere belief that a warrant was not required. Respondent Bell stated in the suppression hearing that he believed from the outset that criminal activity was involved and that prosecution was a possibility. Indeed, his testimony indicates that consideration was given to seeking a warrant. Respondent Bell also testified that he was aware of the decision in *Zweibon I.* Since that case put the government on notice that warrants would be required for all wiretaps in the District of Columbia, *see,* pp 12 - 13, *supra,* there is an inference that respondents recklessly disregarded *Zweibon I.*

respondents' assertions which had been transported from the criminal case where petitioners were not parties and the precise issues involved in this case were not raised. Furthermore, the Court of Appeals ruled that petitioners had failed to prove that the interception of their conversations had been unreasonable because they had not introduced any facts concerning "the number, timing, frequency, or subject matter of their alleged conversations with Truong." (App. 28a.) Yet petitioners were stymied in their efforts to gather this information when the District Court stayed production of the surveillance records.

It should be emphasized that petitioners in this case were mindful of the admonition in *Butz* with respect to personally burdening high officials. They did not assert an unconditional right to depose the Attorney General but proposed postponing his deposition until after they had received the documents relevant to the surveillance. This course would have permitted the District Court to determine whether additional discovery was appropriate in light of issues revealed or suggested by the documents. If the documents provided support for petitioners' claims, depositions of lower ranking officials could have been scheduled before determining whether there was sufficient evidence to require the Attorney General to testify. Thus, petitioners were attempting to pursue a reasonable course of discovery which would have permitted the District Court to prevent unnecessary burdens on the Attorney General. Although "firm application of the Federal Rules of Civil Procedure" is appropriate in damage actions against government officials, *Butz* v. *Economou, supra,* 438 U.S. at 508, that principle must include a fair opportunity for plaintiffs to take reasonable discovery.

If the lopsided approach to summary procedures sanctioned by the Court of Appeals is permitted to stand,

assertion of the qualified immunity defense is likely to present an insuperable obstacle to plaintiffs. Petitioners agree that frivolous cases should be quickly dismissed and high officials should not be unnecessarily burdened. But this case is plainly not frivolous, and preservation of petitioners' interests requires a more discerning approach than was employed below. Because of the importance of these issues, this Court should grant review.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully Submitted,

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January 10, 1981

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1232

JACQUELYN M. CHAGNON, *et al.*, APPELLANTS

v.

GRIFFIN BELL, *et al.*

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil Action No. 78-646)

Argued March 28, 1980

Decided August 14, 1980

Mark H. Lynch with whom *John H. F. Shattuck* was on the brief, for appellant.

John J. Farley, III, Attorney, Department of Justice with whom *Carl S. Rauh*, United States Attorney at the

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

time the brief was filed and *Robert E. Kapp*, Attorney, Department of Justice were on the brief for appellees.

Before ROBINSON and EDWARDS, *Circuit Judges*, and GASCH,* *United States District Court Judge* for the District of Columbia.

Opinion for the court filed by *Circuit Judge* EDWARDS.

EDWARDS, *Circuit Judge*: The question presented by this appeal is whether the District Court correctly ruled that the Attorney General of the United States, and those acting under him and at his direction, were entitled to a summary judgment on grounds of official immunity. Appellants filed suit in District Court on April 11, 1978, seeking money damages and equitable relief, after learning that appellees had overheard their conversations while conducting a warrantless wiretap on the telephone at the residence of a suspected foreign agent (Truong).

Appellants assert that, since the warrantless wiretaps violated settled law, the District Court was without justification in granting qualified immunity to the appellees in this case. Appellants also contend that the grant of summary judgment by this District Court was inappropriate because they "were denied the opportunity to conduct any discovery and [because] there were factual disputes as to: (a) whether defendants had probable cause to believe that the target of the wiretap was the agent of a foreign power; (b) whether the wiretap was initiated and conducted for prosecutorial rather than foreign intelligence purposes; (c) whether defendants reasonably minimized the interception of calls unrelated to the purpose of the surveillance; and (d) whether defendants intentionally, wilfully, and recklessly violated plaintiffs' constitutional and statutory rights." Appellants' brief, pp. 1-2.

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* Sitting by designation pursuant to 28 U.S.C. § 292(a) (1976).

Appellants based their claim for relief on constitutional protections allegedly afforded them by the First, Fourth, Fifth, and Ninth Amendments, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 (1976) and 47 U.S.C. § 605 (1976). Appellees moved to dismiss or, in the alternative, for summary judgment. The Honorable John H. Pratt, District Judge, found that the Attorney General had had valid grounds to believe that Truong was acting as a foreign agent and that the warrantless wiretap had violated no clearly established law. Given these findings, the District Court held that the appellees were entitled to qualified immunity as a matter of law and granted the motion for summary judgment. *Chagnon v. Bell*, 468 F. Supp. 927, 931-33 (D.D.C. 1979).[1]

In resolving this case in favor of appellees, the District Court was guided by the decision of the Supreme Court in *Butz v. Economou*, 438 U.S. 478 (1978). In *Butz*, the Supreme Court held that federal executive officials are entitled to qualified immunity when they are

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[1] The District Court also ruled that the plaintiffs were not entitled to declaratory relief. *Id.* at 933-34. First, there was no indication that the challenged surveillance, which had been terminated, posed an immediate, adverse threat to the appellants. Nothing indicated that there would be a future warrantless wiretap during which appellants' conversations would be overheard. Second, the passage of the Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (1978), 50 U.S.C. §§ 1801-1811 (Supp. II 1978), made meaningless a ruling on the validity of the surveillance. Third, the precise constitutional and statutory issues raised by the case had already been argued to the Court of Appeals for the Fourth Circuit in the appeal of the underlying criminal charges. *See* note 6, *infra*. To the extent that a ruling on the constitutionality of the surveillance was necessary, the District Court viewed the Fourth Circuit as the appropriate forum. Appellants have not appealed this denial of declaratory relief. *See* Appellants' brief, p. 7 n.3.

sued for damages arising from alleged violations of constitutional rights. In reaching this conclusion, the Court in *Butz* relied on *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (dealing with immunity for state officials), where the Court had held that:

> in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.

Id. at 247-48.

As did the District Court, we too believe that *Butz* is dispositive of this case. We note in particular that, in *Butz*, the Supreme Court warned that the availability of a damage remedy for illegal official conduct, while an essential tool for the vindication of individual constitutional rights, carries with it a special danger of abuse. As the Court indicated, the public interest in holding all citizens accountable to the law must be balanced against the related societal need for vigorous exercise of executive authority. *Id.* at 506. In order to prevent the harassment of federal officials by insubstantial lawsuits, the Court in *Butz* expressly condoned the resolution of cases of this sort by summary judgment. *Id.* at 508.

Before granting summary judgment a trial court is to assess carefully an official's pretrial claim that no genuine issue exists material to his entitlement to immunity. In this case, the District Court upheld the appellees' claim of immunity because the conduct com-

plained of violated no clearly established constitutional right and, further, because the record supported no inference of official malice. Because a careful examination of the record reveals no basis for disturbing the judgments of the District Court, we hereby affirm.

This case raises several questions of great significance. Nevertheless, we should note that a number of the matters at issue here are specifically addressed in the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801-1811 (Supp. II 1978), which Congress enacted after the events giving rise to this litigation. It is therefore unlikely that a case of this nature, involving the precise issues here raised, will arise again at any time in the near future.

I. BACKGROUND

Appellants instituted this action for damages and injunctive and declaratory relief against Griffin Bell, who was then Attorney General of the United States, and three employees of the Federal Bureau of Investigation (FBI),[2] claiming that an unstated number of their conversations were overheard during a period of warrantless electronic surveillance of the home telephone of one Truong Dinh Hung.[3] The claims for damages were grounded on the Fourth Amendment[4] and on Title III

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[2] The three named co-defendants were former FBI Director Clarence M. Kelley, former Acting Director Richard Held and Special Agent William Fleshman, Jr.

[3] Truong, the target of the surveillance, is not a party to this action.

[4] *See Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 395 (1971), where the Court noted that, "[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." This court, relying on *Bivens*, has held an award of monetary relief to be available in cases other than those involving Fourth Amendment claims. *See, e.g., Dellums v.*

of the Ominbus Crime Control and Safe Streets Act of 1968. Following cross motions for summary judgment, Joint Appendix ("J.A.") 17, 117,[5] the District Court issued a Memorandum Opinion and Order sustaining the appellees' position. J.A. 127-34; opinion reported at 468 F. Supp. 927 (D.D.C. 1979).

1. *The Truong Wiretap*

On May 5, 1977, FBI Director Clarence Kelley and Deputy Secretary of State Warren Christopher notified Attorney General Bell of a serious breach of State Department security involving the unauthorized transmission of classified State Department documents to representatives of a hostile foreign government. In the course of briefings on the following day, the Attorney General learned that a joint FBI/CIA counterintelligence investigation directed at suspected agents of the Socialist Republic of Vietnam (SRV) had focused on Truong Dinh Hung, a person known not to be a citizen of the United States. On a number of occasions in the recent past, Truong had employed an undercover FBI/CIA courier to deliver packages to SRV representatives in Paris, France and to transmit material from those representatives to Truong in the United States. A few days prior to May 6, federal agents discovered a number of classified State Department documents in a Truong shipment to Paris. By May 6, the FBI was convinced that Truong was acting as an intelligence agent for the SRV.

Powell, 566 F.2d 167, 194-95 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 916 (1978). Given our disposition of this case on the immunity issue, we find it unnecessary to consider whether money damages may be given to remedy other types of constitutionally protected interests.

[5] Plaintiffs' Cross-Motion was for partial summary judgment declaring the warrantless wiretap *per se* violative of the Fourth Amendment.

State Department officials expressed their concern to the Attorney General that unchecked dissemination of such documents might prejudice United States relations with foreign countries, particularly in Southeast Asia. Furthermore, it was feared that the contents of some of the classified documents might identify and could perhaps endanger individuals, including officials of foreign governments, who were supplying information to the United States Government. Because the State Department had no information as to the inside source of the document leaks, the magnitude of these risks was considered to be particularly substantial. Deputy Secretary Christopher informed the Attorney General that in his estimation this compromise of security presented "a very grave problem." [6]

On the basis of the May 6 briefings, the Attorney General determined that Truong was acting as part of a network of SRV agents. Accordingly, pursuant to authority delegated to him in writing by the President, the Attorney General authorized an FBI wiretap of Truong's home telephone on May 9, 1977. No prior judicial approval for the surveillance was sought.

The Attorney General viewed the Truong wiretap as indispensable to an effective counterintelligence operation. He stated that:

> It was imperative, in my view, to determine the extent of the material already compromised, the source of the materials within this Government, the identity and scope of Truong's intelligence network, and the extent of this network's activities.

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[6] J.A. 52. This statement is taken from the testimony of the Attorney General of the United States given March 20, 1978 in the related case of *United States v. Humphrey*, 456 F. Supp. 51 (E.D. Va. 1978), *aff'd United States v. Truong*, No. 78-5176 (4th Cir., July 17, 1980).

J.A. 25. The decision to authorize the surveillance without seeking a judicial warrant apparently reflected the Attorney General's routine approach to counterintelligence investigations. He believed that no court order was required where (1) the Attorney General of the United States was "satisfied that the subject of the surveillance [was] an agent of a foreign power," and (2) the purpose of the surveillance was "to protect national security information against foreign intelligence activities and to obtain foreign intelligence information . . . deemed essential to the security of the United States." J.A. 25.

Electronic surveillance of Truong's home telephone commenced on May 11, 1977 and continued, with renewals authorized by the Attorney General in August and November of 1977, until January 31, 1978, when the indictments of Truong and a Ronald Humphrey were returned in the Eastern District of Virginia. Conversations overheard in the course of the wiretap had led to the identification of Ronald Humphrey, an officer of the United States Information Agency, as one suspected source of Truong's access to classified material. During the entire period of the surveillance, the Attorney General remained convinced that the FBI counterintelligence investigation had not yet determined the full etxent of Truong's intelligence activities or identified all of his intelligence sources.

2. *The Criminal Trial of Humphrey and Truong*

At their espionage trial, Humphrey and Truong moved to suppress all evidence obtained as a result of the Truong surveillance.[7] At a two-day evidentiary hearing

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[7] *United States v. Humphrey, supra* note 6. That evidence included, in addition to the conversations seized pursuant to the wiretap challenged here, evidence seized in the course of a microphone surveillance of Truong's apartment and a video surveillance of Humphrey's office at USIA.

on the motion, the trial court received documentary evidence and affidavits and heard testimony, including from the Attorney General as to the foreign counterintelligence context of the surveillance and his rationale for its initiation and conduct.

In ruling on the suppression motion, District Court Judge Bryan submitted the propriety of the Truong surveillance to a three-step analysis. First, as to the Government's reliance on the so-called "foreign agent exception" to the warrant requirement, the court concluded that traditional Fourth Amendment doctrine permits exception to the warrant clause when the Attorney General, acting at the direction of the President, undertakes surveillance of an agent of a foreign power for foreign intelligence or counterintelligence purposes. 456 F. Supp. at 55-57. Second, the court determined that the Truong investigation genuinely involved foreign intelligence. Because the Attorney General had initiated the wiretap against an agent of a foreign power "for the primary, or even sole, purpose of foreign intelligence gathering," the court held that the Attorney General properly had invoked the foreign agent exception. *Id.* at 58.

Third, the court analyzed the duration of the surveillance in light of an independent requirement of reasonableness under the Fourth Amendment. On the theory that reliance on the foreign agent exception was reasonable only so long as foreign intelligence gathering remained the "primary purpose" of the investigation, the court concluded that the warrantless intrusion became unreasonable as of July 20, 1977, when the focus of the surveillance became prosecutorial. The court reached this conclusion even though the investigation continued to retain a parallel foreign intelligence purpose. Accordingly, the judge suppressed all of the wiretap evidence gathered after July 20, 1977. *Id.* at 59.

Humphrey and Truong were convicted on six of the seven counts in the indictment. In their appeal of that conviction to the United States Court of Appeals for the Fourth Circuit, Truong and Humphrey assigned as error Judge Bryan's ruling on the suppression motion, asserting that because the warrantless surveillance was illegal in its entirety, all evidence procured thereby should have been excluded. *See* note 12, *infra.*

3. *The Appeal in the Present Case*

The appellants filed this civil action in District Court on April 11, 1978. The complaint sought damages because appellees overheard the individual appellants' telephone conversations with Truong in the course of the Truong wiretap.[8] In response, the Attorney General[9]

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[8] Appellants' claims for relief based on alleged FBI surveillances of their home telephones were dismissed by the District Court on summary judgment. Appellants have raised a number of contentions relating to this ruling. We have carefully considered all of these contentions and conclude they are lacking in merit. Accordingly, our opinion focuses on the substantive immunity issue raised by this appeal.

[9] For convenience, we will refer generally to the Attorney General in discussing the immunity available to appellees collectively. The District Court and the parties consistently have treated the appellees' entitlement to immunity as a question to be determined at the threshold by the Attorney General's entitlement, and we regard that treatment as proper.

As the Court noted in *Butz*, the broad authority of federal executive officials to direct their subordinates carries with it the danger that such power will be abused. For this reason a serious distortion of immunity doctrine would result were courts routinely to hold inferior officials liable for constitutional violations while immunizing those higher up. The potential for abuse of high authority underscores the necessity for vindication of constitutional guarantees in "an action for damages against the *responsible* official." 438 U.S. at 506 (emphasis added). Moreover, on the facts of this case, it is clear that the FBI officers were entitled to act in reliance

moved to dismiss or, in the alternative, for summary judgment and for a protective order staying discovery pending resolution of the dispositive motion. The District Court granted the stay of discovery over appellants' opposition.

In support of his motion for summary judgment, the Attorney General submitted the complete transcript of his testimony at the suppression hearing in *United States v. Humphrey*, along with his affidavit filed in that action, and the Memorandum Opinion of District Court Judge Bryan summarized above. These documents provided the foundation for the Attorney General's Statement of Material Facts submitted pursuant to Local Rule 1-9(h). J.A. 19. Appellants filed one counteraffidavit, a statement of issues as required by Local Rule 1-9(h) and an affidavit of counsel pursuant to Rule 56(f) of the Federal Rules of Civil Procedure. The Attorney General argued that the record demonstrated the absence of any genuine issue as to his entitlement to qualified immunity under *Butz* and that, therefore, he was entitled to summary judgment on the claims for damages.[10]

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on an official statement of the law by the Attorney General of the United States. *See Smith v. Nixon*, 606 F.2d 1183, 1191 n.47 (D.C. Cir. 1979).

Appellants have admited that the Truong surveillance was initiated and renewed pursuant to the Attorney General's authorization. *See* J.A. 20, 122. Because the FBI appellees, all subordinates of the Attorney General, engaged in the challenged course of conduct entirely at his direction, it is appropriate in this case that their immunity should flow from his. Only if the immunity defense were unavailable to the Attorney General would an independent issue as to the FBI officers' good faith be presented by this appeal.

[10] Because the District Court relied on the doctrine of *qualified immunity*, in a judgment that we here affirm, we find it unnecessary to rule on appellees' claim of *absolute immunity*.

Appellants' opposition to summary judgment consisted in essence of claims that, because the facts of the Truong surveillance gave rise to an inference of its illegality, a genuine dispute existed as to the Attorney General's entitlement to immunity. J.A. 122-23.

After finding that the Attorney General had had valid grounds to believe Truong was acting as an agent of a foreign power, the District Court concluded that the warrantless surveillance had violated no "clearly established" law and that, therefore, the Attorney General was entitled to official immunity for the good faith decisions he had made in a situation that required decisive action to protect and promote governmental interests. The District Court also granted appellees' motion for summary judgment on the request for declaratory relief. *See* note 1, *supra*.

II. The Immunity Defense

1. *The Bases for the Doctrine of Qualified Immunity*

Recent decisions of the Supreme Court and of this court have reaffirmed the principle that executive officials are entitled to the protection of the qualified immunity doctrine as enunciated in *Scheuer v. Rhodes*, 416 U.S. 232 (1974). *See, e.g., Wood v. Strickland*, 420 U.S. 308 (1975); *Procunier v. Navarette*, 434 U.S. 555 (1978); *Butz v. Economou*, 438 U.S. 478 (1978); and *Halperin v. Kissinger*, 606 F.2d 1192 (D.C. Cir. 1979), *cert. granted*, 48 U.S.L.W. 3745 (May 19, 1980). *See also Apton v. Wilson*, 506 F.2d 83 (D.C. Cir. 1974). As has been noted time and again, the qualified immunity doctrine is designed to allow the vindication of individual constitutional rights, while preserving for officials a shield against liability that will serve the public interest in the vigorous exercise of legitimate executive authority.

The need for a significant shield of immunity for the discretionary acts of executive officials is traditionally explained on two related grounds. On the one hand, there

is a perceived danger that the threat of damage liability will deter public officials from taking decisive and disinterested actions in fulfilling their public commitments. On the other hand, there is the possibility of real injustice occurring if public officials are subjected to liability for discretionary acts taken in good faith to enforce the obligations of public office. *See Scheuer v. Rhodes*, 416 U.S. at 240. *See also* Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 223 (1963). Thus, "however worded, the immunity must be such that public school officials understand that action taken in the good-faith fulfillment of their responsibilities and within the bounds of reason under all the circumstances will not be punished and that they need not exercise their discretion with undue timidity." *Wood v. Strickland*, 420 U.S. at 321. Rather than "a badge or emolument of exalted office," immunity must be seen as "an expression of policy designed to aid in the effective functioning of government." *Scheuer v. Rhodes*, 416 U.S. at 242 (quoting *Barr v. Matteo*, 360 U.S. 564, 572-73 (1959)).

The implications of the immunity doctrine for the individual seeking redress for injury caused by official action are clear. The doctrine of immunity *assumes official error* and some consequent harm to individuals, and yet cautions courts not to impose unfairly upon a public officer "the burden of mistakes made in good faith in the course of exercising his discretion within the scope of his official duties." *Wood v. Strickland*, 420 U.S. at 319. As noted in *Scheuer v. Rhodes, supra*:

> Implicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all.

416 U.S. at 242.

The accommodation reached in these cases requires us to acknowledge that, despite the traditional reliance on damage suits as a primary mechanism for the vindication of individual rights,[11] redress may not be available against official action reasonably taken in good faith. Decisions conferring qualified immunity with respect to actions taken by various governmental officials

> are not to be read as derogating the significance of the societal interest in compensating the innocent victims of governmental misconduct. Rather, in each case . . . overriding considerations of public policy nonetheless demanded that the official be given a measure of protection from personal liability.

Owen v. City of Independence, 100 S. Ct. 1398, 1416 (1980).

Simply put, the balance struck by immunity doctrine assumes that society has less to lose from the unredressed injury to individuals that may result from immunizing the good-faith mistakes of public officers than from the timidity in the exercise of public office that would attend the threat of damages liability for honest error.

2. *The Application of Qualified Immunity Doctrine to this Case*

At the time of oral argument in this case, the criminal defendants in *United States v. Humphrey*, *supra* note 6, had challenged the legality of the Truong wiretap in the Fourth Circuit.[12] When questioned from the bench,

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[11] *See* note 4, *supra*.

[12] At the time of oral argument in this case, the Fourth Circuit had yet to rule on the legality of the wiretaps in the appeal from the criminal case. However, on July 17, in a unanimous opinion on this point, the Fourth Circuit affirmed Judge Bryan's decision upholding the legality of the wiretaps. *United States v. Humphrey*, No. 78-5176, slip op. at 6-20 (4th Cir., July 17, 1980).

neither party to this appeal wished us to defer consideration until the Fourth Circuit issued a decision. Had a declaration on the constitutional and statutory propriety of the surveillance been necessary to our decision of this appeal, "considerations of intercircuit comity and the concomitant husbanding of scarce judicial resources" would have made such deferral of consideration appropriate. *See, e.g., County of Los Angeles v. Marshall*, No. 77-2138, slip op. at 5 (D.C. Cir. Mar. 19, 1980). Furthermore, adjudication of the legality of the surveillance in the Fourth Circuit is particularly appropriate, as the record demonstrates that that is the forum calculated to provide the concrete factual setting that sharpens the deliberative process especially demanded for constitutional decisions. *See United States v. UAW*, 352 U.S. 567, 591 (1957).

With this in mind, the issue in this case is narrowly focused. The simple question for resolution here is, on the record before the District Court, and assuming the illegality of the challenged wiretaps, whether there was any genuine issue of fact material to the Attorney General's claim of qualified immunity.

In deciding this question, we assume that the Attorney General, as the ranking law enforcement official in the Federal Government, must be held to know the relevant law. Nevertheless, "since the options which a chief executive and his principal subordinates must consider are far broader and far more subtle than those made by officials with less responsibility, the range of discretion must be comparably broad." *Scheuer v. Rhodes*, 416 U.S. at 247.

In *Wood v. Strickland*, *supra*, the Court held that a school board member would lose immunity only if

> he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the

> student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student.

420 U.S. at 322. Only one of these elements need be present in order for an official to lose his immunity from suit. *See Halperin v. Kissinger*, 606 F.2d at 1209.

In *Procunier*, *supra*, the Court specifically addressed the question of the proper application of the objective element of the *Wood* test when an official has been required to act in an unsettled area of law. Unless the existence of a constitutional right was "clearly established" at the time the challenged action was taken, the Court held that an official could not, as a matter of law, be deprived of official immunity on the basis that he "knew or should have known" that his actions violated that right. Thus, under the first part of the *Wood v. Strickland* rule, the immunity defense would be unavailable only if

> the constitutional right allegedly infringed by [petitioners] was clearly established at the time of their challenged conduct, if they knew or should have known of that right, and if they knew or should have known that their conduct violated the constitutional norm.

Procunier v. Navarette, 434 U.S. at 562.

In *Butz*, *supra*, the Supreme Court merely reaffirmed the continuing vitality of the *Procunier* rule. Thus, *Procunier* and *Butz* provide explicit instruction to the trial court: when a defendant interposes a good-faith defense to a charge of official misconduct, the court must determine as a matter of law whether the charge states a violation of a right that has been authoritatively declared.

Each of the alleged issues of material fact upon which appellants relied in opposing summary judgment is in

essence a claim that the Attorney General "knew or should have known" that the Truong surveillance violated appellants' constitutional rights.[13] As we have explained, absent malice, such a claim defeats an immunity defense only in an area of "clearly established" law. Whether evaluated by reference to Supreme Court and other judicial precedent, to presidential practice, or to then existing congressional legislation,[14] the state of the law with respect to electronic surveillance of foreign agents of foreign powers was, at best, unsettled in 1977-1978, the period of the Truong wiretap.

The Case Law

Our review of the applicable case law reveals that the Supreme Court explicitly left unanswered whether there exists a national security exception to the warrant requirement. For example, in *Katz v. United States*, 389 U.S. 347 (1967), the majority reserved the issue of the status of national security wiretaps, noting that it had not reached the question "[w]hether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment" in such circumstances. *Id.* at 358 n.23.

United States v. United States District Court (Keith), 407 U.S. 297 (1972), the Supreme Court's most recent discussion of the application of the Fourth Amendment to national security surveillance, provided only a partial answer to the question left open in *Katz*. The issue posed

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[13] *See* Appellants' Statement of Genuine Issues As To Which Material Facts Are Either In Dispute Or Unavailable To Plaintiffs. J.A. 123.

[14] A plurality of this court in *Zweibon v. Mitchell (Zweibon I)*, 516 F.2d 594, 671 n.274 (D.C. Cir. 1975) (*en banc*), *cert. denied*, 425 U.S. 944 (1976), identified these as appropriate factors for consideration in determining the reasonableness of a belief in the legality of warrantless wiretapping.

in *Keith* was whether the President, acting through the Attorney General, had the power to authorize warrantless electronic surveillance in a case where the threat to national security came from a domestic organization. Despite the fact that "[t]he use of such surveillance in internal security cases has been sanctioned more or less continuously by various Presidents and Attorneys General since July 1946," *id.* at 310, the Court held that the Fourth Amendment demanded a warrant procedure in any case where the perceived threat to national security emanated from an organization "composed of citizens of the United States and which has no significant connection with a foreign power, its agents or agencies." *Id.* at 309 n.8. The limited scope of the ruling in *Keith* was highlighted by an observation in the opinion that:

> [w]e have not addressed, and express no opinion as to, the issues which may be involved with respect to activities of foreign powers or their agents.

Id. at 321-22. The Court also noted several sources of authority for "the view that warrantless surveillance . . . may be constitutional where foreign powers are involved." *Id.* at 322 n.20. In light of these statements, it is plain that the Supreme Court in *Keith* left unanswered the question whether a foreign agent exception to the warrant requirement exists.

The case law in this circuit is no less equivocal on the question. In *Zweibon v. Mitchell* (*Zweibon I*), 516 F.2d 594 (D.C. Cir. 1975) (*en banc*), *cert. denied*, 425 U.S. 944 (1976), the plurality opinion expressed a view that, absent exigent circumstances, all warrantless electronic surveillance is unreasonable and, hence, *per se* violative of the Fourth Amendment. *Id.* at 614. *Zweibon I* involved a situation where the Attorney General, acting pursuant to presidential directive, had authorized the warrantless wiretap of a domestic organization that was

viewed as a threat to the nation's foreign relations. Although some of the plurality's dicta in *Zweibon I* sweeps broadly, the holding of the court is plainly restricted. Thus, the plurality opinion expressly notes that:

> We hold today *only* that a warrant must be obtained before a wiretap is installed on a *domestic organization that is neither the agent of nor acting in collaboration with a foreign power.*

Id. at 614 (emphasis added). Thus, read in its broadest light, *Zweibon I* restricted the potential reach of the foreign agent exception by explicitly eliminating from its purview surveillance aimed at individuals or domestic organizations not acting on behalf of a foreign power. The *Zweibon I* court never squarely ruled that the putative foreign agent exception to the warrant requirement does not exist.[15]

In view of these opinions, we cannot accept appellants' position that *Zweibon I*, or any other decision, authoritatively eliminated the foreign agent exception. Appellants' contention, that in authorizing the warrantless wiretap of Truong's telephone, the Attorney General "ignore[d] *Zweibon I*," thereby acting "unreasonably and at [his] peril," [16] is refuted by the very language of the *Zweibon I* decision. *Zweibon I* thus cannot be seen to furnish an adequate basis for claiming a "clearly established" constitutional right protecting appellants from having their

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[15] The court in *Zweibon I* recognized that presidentially authorized electronic surveillance in the area of national security had continued openly, as an accepted practice in the executive branch, in the decade following the issuance of the decision in *Katz*. *See* 516 F.2d at 618 n.66. *See also Keith*, *supra*, 407 U.S. at 310-11.

[16] Appellants' reply brief, p. 8.

conversations overheard in the course of a warrantless surveillance of a foreign agent's telephone.[17]

Presidential Practice

Examination of presidential practice in this area lends further support to the District Court's finding that the Truong tap violated no "clearly established" law. As we suggested earlier, every President since Franklin D. Roosevelt has claimed the "inherent" constitutional power to authorize warrantless surveillance in cases vitally affecting the national security. Furthermore, all Presidents to hold office since *Katz* was decided have advocated a broad exception to the warrant requirement for surveillance targeted at agents of foreign governments.[18] Indeed, public and congressional recognition of the consistency of such assertions of presidential power, and of the general judicial reluctance to proscribe them, provided the impetus for a five-year effort to enact legislation to establish a judicial warrant requirement and

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[17] Other circuit courts in the pre-1977 to 1978 period had recognized a foreign agent exception of varying scope. *See, e.g., United States v. Butenko*, 494 F.2d 593 (3d Cir.) (*en banc*), *cert. denied*, 419 U.S. 881 (1974); *United States v. Brown*, 484 F.2d 418, 426 (5th Cir. 1973), *cert. denied*, 415 U.S. 960 (1974). Appellants were unable to cite a single case that had flatly rejected the foreign agent exception. The Truong situation required a judgment to be made, not merely within a generally unsettled and evolving area of law, but on a *specific* question *explicitly* reserved in earlier relevant decisions. If this were a case where an official sought to defend a particular decision merely on the basis of uncertainty or debate in a general doctrinal area, we would be faced with a more subtle and difficult determination than the one required here.

[18] *See Keith*, 407 U.S. 297, 310-11; *Zweibon I*, 516 F.2d at 616-20. *See generally* Shapiro, *The Foreign Intelligence Surveillance Act: Legislative Balancing of National Security and the Fourth Amendment*, 15 HARV. J. LEGIS. 119, 136-46 (1977).

other procedures covering electronic surveillance in a foreign intelligence or counterintelligence context.[19] These efforts culminated in the passage of the Foreign Intelligence Surveillance Act of 1978.[20]

Legislation

Just as the Attorney General could have found no authoritative judicial or presidential statement proscribing warrantless wiretaps such as the Truong surveillance, any search for definitive legislative guidance would have been futile. Because Title III, the only relevant legislation, "expressly does not limit the President's constitutional power to wiretap in national security situations," *Halperin v. Kissinger*, 606 F.2d at 1202, and because the Truong surveillance was genuinely based on national security concerns, Title III does not apply to this case. Furthermore, since Congress made the application of Title III turn on the future course of constitutional law,[21] it is self-evident that Title III pro-

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[19] *See generally* Shapiro, *supra* note 18.

[20] Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified at 50 U.S.C. §§ 1801-1811 (Supp. II 1978)). The Act specifies procedures, including a warrant procedure, for wiretapping and eavesdropping of "agents of a foreign power" and participants in terrorist acts. § 101(b) & (c).

[21] As was noted in *Zweibon I*, the language and the legislative history of the so-called "national security proviso" of Title III reflected a congressional intent not to impose a statutory warrant requirement in any case in which no warrant was constitutionally mandated. 516 F.2d at 614 n.46. That proviso contained in § 2511(3) of Title III disclaims any congressional intent *inter alia* to "limit the constitutional power of the President to take such measures as he deems necessary . . . to obtain foreign intelligence information deemed essential to the security of the United States or to protect national security information against foreign intelligence activities." Section 2511(3) was repealed by § 201(c) of the Foreign Intelligence Surveillance Act of 1978.

vided the Attorney General no guidance in the Truong situation.[22]

As our previous cases demonstrate, when the foreign agent exception is invoked to justify warrantless surveillance, courts must be alert to the possible pretextuality of the claim. Here the good faith defense based on a presumed foreign agent exception succeeds because this record demonstrates a "direct link between the wiretap target and a foreign interest as a justification for surveillance" and because the surveillance was "reasonably intended to guard national security data from foreign intelligence agencies." *Halperin v. Kissinger*, 606 F.2d at 1204. The record was devoid of facts from which contrary inferences could be drawn. Significantly, appellants, in opposing summary judgment, left uncontested the Government's statements that "the Attorney General had determined that Truong Dinh Hung was acting as a foreign power" and that he had instituted the Truong wiretap as a foreign national security surveillance. The undisputed validity of the Attorney General's professed national security concerns was an essential prerequisite to the District Court's conclusion that the warrantless wiretap contravened no clearly established law. This case is plainly distinguishable from cases involving the incantation of the foreign security shield by governmental defendants where substantial question as to the pretextuality of the claim exists. *See, e.g., Smith v. Nixon*, 606 F.2d 1183, 1188 (D.C. Cir. 1979) (allegation that wiretap initiated to uncover sources of news stories "personally embarassing" to governmental defendants uncontradicted in record); *Halperin v. Kissinger*, 606 F.2d at

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[22] As to the immunity issue at the heart of this case, the immunity available to the Attorney General under § 2520 of Title III is in any case identical to the common law good faith defense applicable to appellants' Fourth Amendment claim. *See Halperin v. Kissinger*, 606 F.2d at 1209 n.115.

1204-05 (evidence that Government falsely relied on national security rationale as a pretext to justify politically motivated surveillance).

3. *Application of the Fourth Amendment*

Appellants' numerous arguments that the Truong search was unreasonable under the Fourth Amendment fails to advance our immunity analysis. Appellants' attempts to equate the Fourth Amendment standard of reasonableness with the "reasonableness" inquiry a court conducts in evaluating an immunity defense misconceives the application of the immunity doctrine. A Fourth Amendment reasonableness assessment is a definitive determination of the legality of the tap, after the tap was conducted. Thus, to term a concededly illegal search or seizure "unreasonable" in constitutional terms is merely to state a legal conclusion. In contrast, the essential function of the reasonableness analysis under the objective element of the immunity doctrine is to carve out an area of protected illegal conduct or mistake. Yet appellants turn a blind eye to this simple truth. Having conceded the point that it "has not been conclusively decided by any court" that the Fourth Amendment requires a warrant authorizing surveillance of a foreign agent (*see* Plaintiffs' Opposition to Defendants' Motion for Order Staying Discovery at 3 n.*), appellants nevertheless make the anomalous suggestion that the Attorney General should be held to have acted "unreasonably and at [his] peril" in ignoring applicable precedent. Appellants' reply brief, p. 8. This we cannot do.

Appellants alternatively argue that even if his reliance on a foreign agent exception should not, by itself, deprive the Attorney General of immunity, genuine issues as to the particulars of the wiretap still made summary judgment inappropriate. Appellants claim that, because the Truong tap was instituted without probable

cause, because it had a "prosecutorial purpose," and because it reflected inadequate "minimization," genuine issues as to whether the wiretap was "unreasonable" precluded summary judgment on the immunity defense. Upon careful inspection, these additional arguments reveal the same flawed logic and mistaken legal premises earlier described. Whether official action was "reasonable" under the Fourth Amendment is simply not the appropriate focus of immunity inquiry. Rather, the question is whether the conduct complained of transgressed "clearly established" constitutional limits. As the District Court correctly observed, the immunity doctrine precludes liability for "mere mistakes in judgment, whether the mistake is one of fact or one of law." 468 F. Supp. at 933 (quoting *Butz v. Economou*, 438 U.S. at 507). A bare claim of official error, however persuasively asserted, is not a sufficient predicate for depriving an official of the immunity shield.

Appellants' probable cause argument ignores this fundamental principle of immunity doctrine. At the outset, we note that at the time the wiretap was installed, there was as yet no authoritative standard setting forth the kind and quantity of information necessary to justify foreign security surveillance.[23] The *Keith* opinion made this clear. There the Court, noting that the Fourth Amendment protection does not admit of rote application, indicated that the Constitution does not mandate that a criminal standard of probable cause be met for a warrant to issue for domestic security surveillance. Indeed, *Keith* seemed to invite a warrant procedure that significantly departs from the criminal standard. 407 U.S.

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[23] Appellants have never challenged the Attorney General's claim that the surveillance was instituted in full compliance with Executive Order 11905, 41 Fed. Reg. 7703 (Feb. 19, 1976), one "clearly established" source of guidance. *See* Appellees' brief, p. 33.

at 322-23. The rationale for this departure applies with equal if not greater force in the context of foreign security. While *Keith* appeared to contemplate, but failed to define, a somewhat relaxed version of probable cause in the context of domestic surveillance, the question of probable cause in the foreign security area was simply not discussed.[24]

Appellants' contentions regarding the scope and duration of the Truong tap are equally unpersuasive given the unsettled nature of the law at the time when the wiretaps occurred.[25]

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[24] In any case, we must reject the notion that a dispute as to the *existence* of probable cause necessarily precludes summary judgment on an immunity defense to a claimed Fourth Amendment violation. The existence of probable cause, however defined, is not a required element of the defense. *See Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 456 F.2d 1339, 1348 (2d Cir. 1972) (reasonableness of belief that probable cause exists rather than existence of probable cause in the constitutional sense must be proved).

[25] One such challenge rests on the premise that a warrant is required for a foreign security surveillance for any period in which the Government's "primary purpose" is "prosecutorial." Plaintiffs' only source of authority for this premise is *United States v. Butenko, supra* note 17, which supports the proposition that warrantless surveillance of a foreign agent is permissible so long as the "primary purpose" of the surveillance is intelligence gathering. Because the facts in *Butenko* revealed that intelligence had been the "sole purpose" of the tap in question, the court had no occasion to define the reach of the "primary purpose test." Other courts recognizing the foreign agent exception have placed no such limit on its reach. *See, e.g., United States v. Brown, supra* note 17. Notably, appellants have conceded that, as Justice Department guidelines required, the Attorney General terminated the wiretap when Truong was indicted.

The absence of clear standards for defining or evaluating the "purpose" of a warrantless "national security" wiretap is hardly surprising in light of the fact that the more basic

Appellants further contend that, because of inadequate "minimization," the Truong tap violated "clearly established" Fourth Amendment precepts of reasonableness. The Fourth Amendment requires that a judicial order authorizing electronic surveillance affords protections that permit "no greater invasion of privacy . . . than [is] necessary under the circumstances." *Katz v. United States*, 389 U.S. at 355 (quoting *Berger v. New York*, 388 U.S. 41, 57 (1967)). Certainly a warrantless wiretap should provide no less protection. Application of this priniple to the Truong surveillance, however, unavoidably entailed an exercise of judgment, and uncertainty invites error. Our review of the scope of the Truong surveillance in light of legal standards "clearly established" at the time persuades us that appellants allege but another instance of possible error that fails, standing alone, to raise an issue material to the immunity question before us.

In determining the appropriate strategy for the Truong surveillance, the Attorney General had to consider the "necessarily broad and continuing nature of intelligence gathering," which justifies surveillance of a scope far greater than that appropriate to "ordinary crime." *Keith*, 407 U.S. at 320, 322. The Court in *Keith* declined to delineate "precise standards for domestic security warrants," inviting Congress to consider standards substantially different than those prescribed in Title III. *Id.* at

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question—the existence of the foreign agent exception—had never been settled. Accordingly, appellants' allegations of prosecutorial purpose raise no genuine issue material to the Attorney General's right to immunity. Furthermore, it is not at all apparent that the existence of "prosecutorial purpose" should be determinative of the basic issue here—the reach of the warrant requirement in foreign agent cases. Official surveillance, whether its purpose be criminal investigation *or* intelligence gathering, risks infringement of constitutional interests. *See Keith*, 407 U.S. at 320. For this reason there may be no principled basis for the distinction appellants here urge.

323. Because, as we have stated above, Title III did not apply to the Truong surveillance, appellants' reliance on Title III minimization doctrine, as according them "clearly established" rights, is unavailing.

Even in the "ordinary" criminal situations covered by the statute, Title III does not provide minimization rules capable of mechanical application. In *Scott v. United States*, 436 U.S. 128 (1978), a Title III case involving surveillance directed at a criminal conspiracy, the Court held that proof that sixty percent of the intercepted calls were nonpertinent did not require a finding of inadequate minimization. *Id.* at 141-42. That the intercepted calls were very short, that they were "one-time only" calls, or that they were "ambiguous in nature or apparently involved guarded or coded language," were among the many reasons that might justify a "relatively high" percentage of nonpertinent calls; in such cases, agents could "hardly be expected to know that the calls [were] not pertinent prior to their termination." *Id.* at 140. Where an investigation is thought to focus on a widespread conspiracy, a commensurately widespread surveillance might be justified in an attempt to determine the precise scope of the enterprise. And the nature of the surveillance target's suspected role in the conspiracy is an essential factor in assessing the minimization required in the tap of his phone:

> For example, if the agents are permitted to tap a public telephone because one individual is thought to be placing bets over the phone, substantial doubts as to minimization may arise if the agents listen to every call which goes out over the phone regardless of who places the call. *On the other hand, if the phone is located in the residence of a person who is thought to be the head of a major drug ring, a contrary conclusion may be indicated.*

Id. (emphasis added).

We emphasize once more that our immunity inquiry does not focus on the actual reasonableness of the scope of the Truong surveillance. Nor does the record contain any facts that would enable us to do so. In opposing summary judgment appellants submitted no affidavits containing information as to the number, timing, frequency, or subject matter of their alleged conversations with Truong, information presumably within appellants' personal knowledge. Their minimization arguments are couched in the broadest of terms—terms that merely parallel the allegations of their complaint that "[a]ll of [their] conversations with Mr. Truong over his telephone, during the period of [the] wiretap thereon, were intercepted." J.A. 7.[26] Without such facts there can be support neither for the contention that the Truong tap was inadequately minimized *as to appellants*, nor for the proposition that this alleged failure of minimization was in disregard of established law.

In this "atmosphere of confusion, ambiguity," and imminent change with regard to the law of foreign security surveillance, the Attorney General was entitled to consider a broad range of options in exercising the wide scope of discretion that his post entails; he was also obliged to "act swiftly and firmly at the risk that action deferred [would] be futile or constitute virtual abdication of office." *Scheuer v. Rhodes*, 416 U.S. at 246. We therefore decline appellants' invitation to engage in a *post hoc* usurpation of the legislative function by imposing liability on the Attorney General for failure to anticipate

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[26] The absence of any factual support for a minimization claim is particularly evident in the only affidavit submitted by appellants, that of counsel for Truong in the criminal trial. Although, as appellants inform us, Truong's counsel reviewed the surveillance transcripts, he was able to swear only that each appellant's conversations had been "intercepted . . . over a period of time commencing on or about May 11, 1977." J.A. 120.

legislative reform. The conduct of foreign security surveillance was, whether by default or design, committed to the Attorney General's discretion in 1977-1978. Because he was required to act in a legislative vacuum and in the "absence of any generally accepted standard for testing the constitutionality" of foreign security wiretaps, *see Procunier v. Navarette*, 434 U.S. at 563 (quoting *Procunier v. Martinez*, 416 U.S. 396, 407 (1974)), we cannot hold that he acted with such disregard for established law that his conduct "cannot reasonably be characterized as being in good faith." *Wood v. Strickland*, 420 U.S. at 322.

4. *The Lack of Any Genuine Issue On Malice*

Because the Truong surveillance violated no rights of appellants "clearly established" during the relevant period, the Attorney General was entitled to summary judgment on his immunity defense unless a genuine dispute existed as to whether he had "acted with 'malicious intention' to deprive [appellants] of a constitutional right or to cause [them] 'other injury.'" *Procunier v. Navarette*, 434 U.S. at 566. This subjective element of the standard enunciated in *Wood v. Strickland*, *supra*, contemplates that the accused official intends the consequences of his conduct. *See Procunier v. Navarette*, 434 U.S. at 566.

In opposing summary judgment, appellants made no actual claim that the Attorney General acted with malicious motivations. Rather, the essence of each of their proffered disputes was a claim of mistake—that the Attorney General "knew or should have known" of the illegality of the Truong wiretap. We reject any suggestion that we can infer malice from any mistakes or errors of judgment that the Attorney General may have made with respect to matters not covered by "clearly established" law. A plaintiff must make "some showing" of malice to state a genuine issue as to the *bona fides*

of the official's immunity defense. *Butz v. Economou*, 438 U.S. at 498. No such showing has been made here.[27]

The voluminous record in this case reveals neither evidence of malice nor a single fact from which an inference of malice could reasonably be drawn. The question of the Attorney General's state of mind was extensively developed in the record before the District Court. We are convinced, upon careful review of that record, that even granting all inferences and resolving all disputes in the appellants' favor, no reasonable person could infer that the Attorney General had acted with malicious intent. The record abounded with evidence of the Attorney General's actual belief that a warrant was not required for electronic surveillance of a foreign agent.[28]

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[27] In their complaint the appellants allege that the appellees intentionally and willfully violated appellants' constitutional and statutory rights. J.A. 10. The appellants also list as a genuine issue of fact whether the appellees believed the Truong wiretap to be legal. J.A. 123. We assume without deciding that these statements are sufficient to allege malice.

We note that a recent Supreme Court case, *Gomez v. Toledo*, 100 S. Ct. 1920 (1980), holds that in a suit under 42 U.S.C. § 1983 (1976), brought against a public official, the plaintiff need not allege malice. Rather, the defendant must plead good faith as an affirmative defense. Even assuming that *Gomez*, which involved a statutory cause of action, is applicable to the present case, which involves a constitutional cause of action, we find that appellees have demonstrated in the record, without contradiction, that their actions were taken in good faith.

[28] In 1973, then-Judge Bell authored *United States v. Brown*, *supra* note 17, a post-*Keith* case in which the Fifth Circuit reaffirmed its rule that an exception to the warrant requirement exists when the President authorizes surveillance of a foreign agent. *See also* J.A. 16, 21, 36-37, 72, 106-07. Judge Bryan, in the criminal case, found foreign intelligence to be the Attorney General's "primary, or even sole, purpose" in instituting the tap. *United States v. Humphrey*, 456 F. Supp. at 58.

Finally, the District Court had before it detailed and non-conclusory evidence that the Attorney General had acted on his own reasoned assessment of the necessary scope and duration of the surveillance. The Attorney General testified that, having explicitly considered the need to "minimize" or gather information by the least intrusive means possible, J.A. 65-67, 102-03, he had judged it necessary to intercept all calls on Truong's home telephone because, during the entire period of surveillance,

> I did not believe we had identified all of Truong's intelligence sources and contacts and we were not sure we knew the complete extent of SRV intelligence operations in this country.

J.A. 29. The Attorney General knew of the FBI investigation and was convinced that every effort was being made to minimize the required surveillance. J.A. 102.

What emerges here is an essentially uncontested picture of a high-level federal official required to act outside the zone of safely settled constitutional doctrine in a matter he viewed as posing an urgent threat to national security. His actions, if mistaken, conformed with prior presidential practice and had colorable claims to supporting judicial authority. In such an instance we accord immunity in order "to forestall an atmosphere of intimidation that would conflict with [his] designated functions in a principled fashion." *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979).

Our review of the record thus convinces us that, with regard to the one potential factual issue in this case, the Attorney General met the burden imposed on him by Rule 56(c), which requires the party moving for summary judgment "to show initially the absence of

a genuine issue concerning any material fact," [29] granting all favorable inferences to the party opposing the motion. While the moving party's burden is a substantial one, the trial court must not interpret that burden so as effectively to preclude any possibility of summary judgment on an immunity claim. Yet appellants' argument, that allegations of intentional or reckless injury "cannot be disposed of on a motion for summary judgment," [30] invites this possibility. In view of the Supreme Court's injunction that damage suits against federal officials "need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity," *Butz v. Economou*, 438 U.S. at 508, a defendant's claim that the record supports no inference of his bad faith merits careful consideration. To hold that a governmental of-

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[29] *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159 (1970). *See Smith v. Nixon*, 606 F.2d at 1187. We are also required to consider, in light of appellants' failure to file counter-affidavits setting forth specific facts showing that there is a genuine issue for trial, as required by Rule 56(e), whether appellants have shown sufficient reasons, under Rule 56(f), why they could present no facts to justify their opposition to summary judgment. Rule 56 does not allow the party opposing summary judgment to create a dispute as to a material fact asserted in an affidavit simply by relying on the allegations of his complaint.

Plaintiffs must adduce, at the very least, some "specific facts from which a reasonable man, viewing all the evidence in the light most favorable to plaintiffs and resolving all testimonial conflicts in the same manner, could infer that the defendants were acting . . . in bad faith." *Halperin v. Kissinger*, 606 F.2d at 1209 n.119 (quoting *Askew v. Bloemker*, 548 F.2d 673, 679 (7th Cir. 1976)). Where such facts are entirely lacking, "plaintiffs may not play dog in the manger; and firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits." *Butz v. Economou*, 438 U.S. at 508.

[30] Appellants' brief, p. 35.

ficial cannot demonstrate the absence of a genuine issue as to malice on a motion for summary judgment would be to reduce the availability of summary judgment to situations in which plaintiff fails to allege malice. Such a rule would prevent the quick termination of insubstantial lawsuits against federal officials, as endorsed by the decision in *Butz*, and invite the very sort of "artful pleading" against which it cautioned. *Id.* at 507.

On the basis of the entire record before us, we hold that the District Court committed no error in rejecting any claim of malice.

III. The Stay of Discovery

Appellants argue that the District Court erred in granting the Attorney General's motion to stay discovery pending resolution of the dispositive motion on his immunity defense. The essence of this argument is that appellants' failure to "set forth specific facts showing that there is a genuine issue for trial," as required by Rule 56(e) of the Federal Rules of Civil Procedure, is attributable to the District Court's refusal to permit discovery in response to appellants' Rule 56(f) claim that discovery was necessary because facts essential to justify their opposition were in the Attorney General's control. This argument suggests important and complex issues about the relation of a trial court's discretion to control discovery to the role of summary procedures in suits where official immunity is at issue. Fortunately, however, the difficulty in resolving appellants' claim in this factual and procedural context is not commensurate with the difficulties these interrelated issues might otherwise pose.

That the district courts are to accord great weight to the concept of relevancy in disposing of discovery motions was recently emphasized by the Supreme Court in *Herbert v. Lando*, 441 U.S. 153 (1979):

> [T]he discovery provisions, like all of the Federal Rules of Civil Procedure, are subject to the injunction of Rule 1 that they "be construed to secure the just, *speedy* and *inexpensive* determination of every action." To this end, the requirement of Rule 26(b)(1) that the material sought in discovery be "relevant" should be firmly applied, and the district courts should not neglect their power to restrict discovery where "justice requires [protection for] a party or person from annoyance, embarassment, oppression, or undue burden or expense . . ." Rule 26(c). With this authority at hand, judges should not hesitate to exercise appropriate control over the discovery process.

Id. at 177 (emphasis in original).

In the case of suits against governmental officials, we are mindful that uncontrolled discovery in the course of "insubstantial lawsuits" can be a form of harassment that imposes an "undue burden" on the time and resources of public officials and their agencies. Therefore, as we have noted earlier, close control of discovery is "essential to the preservation of meaningful official immunity." *Halperin v. Kissinger*, 606 F.2d at 1209 n.120.

When appellants' claims to discovery are analyzed in light of these principles, it is evident that the District Court's grant of the stay was not, on this record, an abuse of discretion. Appellants' discovery request was designed to elicit documents relevant to their stated factual disputes, all of which, as we have explained, were immaterial to the immunity questions before the District Court. While appellants' alleged disputed issues may be perceived as statements of disagreement with the District Court's findings of law, they are not "factual" issues such as to preclude summary judgment. The District Court plainly had the authority to stay appellants' discovery request as not "relevant" to the question of law before it.

IV. Conclusion

For the foregoing reasons, we affirm the judgment of the District Court. Whether or not the acts complained of here might be subject to different treatment under the Foreign Intelligence Surveillance Act is a matter that need not occupy us in this case. On the specific facts of this case, and in light of the law that existed at the time when the disputed surveillance took place, it must be found that the acts of the Attorney General were protected by the doctrine of qualified immunity. The judgment of the District Court is accordingly affirmed.

So ordered.

APPENDIX B

United States Court of Appeals
For the District of Columbia Circuit
September Term, 1979

No. 79-1232

JACQUELYN M. CHAGNON, et al.,
Appellants

v.

GRIFFIN BELL, et al.

Before: ROBINSON and EDWARDS, Circuit Judges, and GASCH*, United States District Court Judge for the District of Columbia

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof it is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court
/s/ George A. Fisher
Clerk

Date: August 14, 1980
Opinion for the Court filed by Circuit Judge Edwards

*Sitting by designation pursuant to 28 U.S.C. § 292(a).

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JACQUELYN M. CHAGNON, *et al.*,	)	
	)	
Plaintiffs,	)	
vs.	)	Civil Action
	)	No. 78-646
GRIFFIN BELL, *et al.*,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

This action by four plaintiffs against Attorney General Griffin B. Bell and three employees of the FBI seeks monetary damages and declaratory relief for allegedly illegal surveillance. They allege that their conversations with one Truong Dinh Hung were overheard during an allegedly unlawful electronic surveillance. Defendants have filed a motion to dismiss or in the alternative for summary judgment. Their motion alleges that (1) the complaint fails to state a legally cognizable statutory cause of action; (2) the complaint fails to state a legally cognizable constitutional cause of action; (3) there is no subject matter jurisdiction because the $10,000 jurisdictional amount requirement has not been satisfied; and (4) the defendants are immune under the doctrines of absolute and qualified immunity; and (5) the civil damage remedy which plaintiff seeks may not be given retroactive application. Plaintiffs have filed a cross-motion for summary judgment alleging that the court can issue a declaratory judgment that the surveillance of Hung was in violation of the Fourth Amendment. Because plaintiff and defendants have submitted and we have considered affidavits and exhibits out-

side the pleadings in this action, we treat defendants' motion to dismiss as a motion for summary judgment. Federal Rule of Civil Procedure 12(b). For reasons discussed below, we grant defendants' motion for summary judgment and deny plaintiffs' motion for partial summary judgment.

I. Statement of Facts

We find that there are no genuine issues of material fact which would preclude the entry of summary judgment in this action. On May 5, 1977, Attorney General Bell was advised by telephone calls from Clarence Kelley, Director of the FBI, and by Warren Christopher, Deputy Secretary of State, that there had been a compromise of security involving classified Department of State documents. On May 6, 1977, the Attorney General was advised that an individual working clandestinely for the FBI and the CIA had served as a courier between Truong Dinh Hung, who was known not to be a United States citizen, and representatives of the Socialist Republic of Vietnam in Paris, France. The Attorney General was further advised that one of the packages which had been carried by this individual contained classified State Department documents. On May 9, 1977, the Attorney General authorized a wiretap on the telephone of Troung Dinh Hung in the District of Columbia. The Attorney General has stated that he authorized the wiretap to determine the extent of material already compromised, the source of the material, the identity and scope of Truong Dinh Hung's network and the extent of the network's activities. Affidavit of Attorney General Griffin B. Bell, ¶ 6, attached to defendants' motion to dismiss or in the alternative for summary judgment (AG affidavit); Transcript of Testimony of Griffin B. Bell, *United States v. Hung*, No.

78-25-A., E. D. Va., March 20, 1978, pp. 8-9, attached to defendants' motion to dismiss or in the alternative for summary judgment. (AG testimony).

The surveillance upon the telephone of Troung Dinh Hung commenced on May 11, 1977. In August and November of 1977, the Attorney General approved renewals of the electronic surveillance. The surveillance was continued until January 31, 1978, when the indictments of Ronald Louis Humphrey and Truong Dinh Hung were returned by the Grand Jury in the United States District Court for the Eastern District of Virginia. It is undisputed that defendants did not acquire a court order to authorize this surveillance at any time during the period of surveillance.

Each of the plaintiffs alleges that he or she has been overheard in telephone conversations with Truong Dinh Hung during the period of time when there was a wiretap on his telephone. Plaintiffs also allege on information and belief that defendants have initiated warrantless wiretaps on each of their home telephones. FBI Supervisory Special Agent William J. Slicks, states, however, that the FBI has not initiated such wiretaps. Declaration of William J. Slicks, ¶ 6, attached to defendants' motion to dismiss or in the alternative for summary judgment.[1]

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[1]Contrary to the assertion of plaintiffs, we find that this declaration satisfies the requirements of Federal Rule of Civil Procedure 56(e) and must be accepted in this motion for summary judgment because it is not refuted by an opposing affidavit. The personal knowledge requirement of this Rule does not require that an affiant personally search an agency's records but is instead satisfied if the affiant directs such a search as was done by the affiant here. Since the declaration states that the Washington Field Office would have been responsible for any electronic surveillance of plaintffs, and absent any reason to believe that the search directed by the declarant was not adequate to identify all FBI records of electronic surveillance of plaintiffs' telephones, we

At the trial of Humphrey and Hung, the criminal defendants moved to suppress, *inter alia,* evidence which was obtained through the electronic surveillance. In an opinion dated March 30, 1978, Judge Albert V. Bryan found that the surveillance was a foreign intelligence investigation and that the Fourth Amendment to the Constitution does not require a warrant for such an investigation when it is authorized by the President or the Attorney General acting under the authority of the President. *United States v. Hung, supra.* The Court also held that the surveillance was reasonable until July 20, 1977, but was not reasonable thereafter because the surveillance was not thereafter conducted for the primary purpose of acquiring national security intelligence. *Id.* On May 19, 1978, defendants Hung and Humphrey were convicted on 6 of the 7 counts contained in the indictment.

II. Jurisdiction

We first treat defendants' threshold argument that this Court lacks subject matter jurisdiction over this action because the amount in controversy to a legal certainty does not exceed $10,000. Defendants first assert that the recent Supreme Court decision in *Carey v. Piphus,* 435 U.S. 247 (1978), establishes that the infringement of a constitutional right will only support the award of nominal damages. Defendants next contend that a complaint should not survive a motion to dismiss unless it states a compensable claim for relief. *Butz v. Economou,* ____ U.S. ____, 46 U.S.L.W. 4952 (June 29, 1978). The argument that the Court lacks jurisdiction is without merit.

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find that the declaration adequately establishes that there is no material issue of whether there was electronic surveillance of plaintiffs' telephones.

Plaintiffs satisfy the amount in controversy requirement for damages sought under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-20 and 47 U.S.C. § 605, (Title III). Title III provides for the recovery of liquidated damages at the rate of $100 per day for each day during which plaintiffs were the subject of an illegal wiretap. 18 U.S.C. § 2520. Since the wiretap at issue in this action continued for 268 days, it cannot be said to be a legal certainty that the complaint does not satisfy the amount in controversy requirement. *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 299 (1938). Plaintiffs also satisfy the amount in controversy requirement for its constitutional claims. The Supreme Court decision in *Carey v. Piphus,* 435 U.S. 247 (1978) was limited to the narrow holding that compensatory damages will not be awarded for violation of Fifth Amendment rights when there was no showing of actual harm. The Court in *Piphus* expressly left open the question of whether violations of constitutional rights other than those protected by the Fifth Amendment would support the award of compensatory damages absent a showing of actual harm. *Id.* at 266. In light of the express limitation of the scope of the holding, the *Piphus* decision should not be read as an implicit overruling of the holding in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971), which held that individuals may be compensated when their Fourth Amendment rights are violated by official misconduct. Plaintiffs' claims for relief from an allegedly illegal search and seizure in violation of the Fourth Amendment therefore do state claims which may be compensated by more than nominal damages.[2] Since it cannot be said to a

[2]Plaintiffs' claims under the First, Fifth and Ninth Amendments are necessarily intertwined with their Fourth Amendment claims. *See Sinclair v. Kleindienst,* No. 610-73, D.D.C., September 23, 1977. Accordingly, we need not consider whether plaintiffs also allege compensable claims under the First, Fifth and Ninth Amendments.

legal certainty that the amount of compensable damage for such an alleged violation to each plaintiff is less than the $10,000 amount in controversy requirement, we hold that this Court also has jurisdiction to consider plaintiffs' constitutional claims. *Accord Dellums v. Powell*, 566 F.2d 167, 194 (D.C.Cir. 1977), *cert. denied*, ____ U.S. ____, 46 U.S.L.W. 3803 (July 3, 1978); *Tatum v. Morton*, 562 F.2d 1279, 1282 (D.C. Cir. 1977).

As stated at the outset, defendants in support of their motion have asserted other defenses, in addition to the claim of lack of subject matter jurisdiction. While there is ample support for defendants' assertion that electronic surveillance of a foreign agent was proper without a warrant because this aspect of national security is committed to the sole authority and discretion of the President and that therefore the complaint fails to state a cognizable statutory or constitutional cause of action, we prefer to rest our decision on grounds of official immunity.

III. Official Immunity

A. Tests for Absolute and Qualified Immunity

The issue of defendants' immunity can be decided independently of the issue of whether plaintiffs state legally cognizable statutory and constitutional causes of action.[3] We first consider whether defendants are entitled to absolute or qualified immunity for any allegedly illegal

[3]The Supreme Court has held that "damage suits concerning constitutional violations need not proceed to trial, but can be terminated upon a properly supported motion for summary judgment based upon the defense of immunity." *Butz v. Economou*, ____U.S.____, 46 U.S.L.W. 4952, 4960 (1978). *See also Procunier v. Navarette*, 434 U.S. 555, 566 (1978).

surveillance of Truong Dinh Hung. Absolute immunity generally relieves a federal official from liability for damages for all discretionary actions, including those which were motivated by malice. *See, e.g., Barr v. Matteo,* 360 U.S. 564 (1959). *See Generally* Davis, Administrative Law Treatise, § 26.00 (1976 Supp.). By contrast, qualified immunity relieves a federal official from liability for damages for discretionary activities *except* those which were motivated by malice. *See, e.g., Butz v. Economou, supra,* at 4960-62. Absent a good faith allegation by plaintiffs that the Attorney General or those acting under his authority were motivated by malice toward Truong Dinh Hung, we accordingly restrict the scope of our inquiry to the issue of whether defendants to this action are entitled to qualified immunity for damages.[4]

The Supreme Court has recently held that "a qualified immunity from damages liability should be the general rule for executive officials charged with constitutional violations." *Butz v. Economou, supra* at 4960. The Court also reaffirmed the holding in *Procunier v. Navarette,* 434 U.S. 555 (1978), that in the absence of a showing of malice, "an official would not be held liable in damages. . . unless the constitutional right he was alleged to have violated was 'clearly established'[5] at the time of the violation." *Butz v. Economou, supra,* at 4958. These holdings clarify the scope of acts for which officials are entitled to qualified immunity. In the context of alleged

---

[4]We do not reach the question whether defendants' actions are also protected under absolute immunity. *Barr v. Matteo, supra.*

[5]In view of the state of the law at the time defendants acted, it is clear that the constitutional rights alleged to have been violated by defendants were anything but "clearly established." See following discussion under ¶ C.

violation of the Constitution or Title III, by electronic surveillance, officials are entitled to qualified immunity where they "can demonstrate (1) that they had a subjective good faith belief that it was constitutional to install warrantless wiretaps under the circumstances of this case; and (2) that this belief was itself reasonable." *Zweibon v. Mitchell*, 516 F.2d 594, 671 (D.C.Cir. 1975).

B. Subjective Good Faith Belief

The affidavits and testimony of the Attorney General adequately demonstrate that the Attorney General subjectively believed that the surveillance of Truong Dinh Hung was in fact constitutional and not prohibited by Title III. *See, e.g.*, AG Affidavit, ¶¶ 7, 16, 17; AG Testimony, pp. 47-48, 77-78. The Attorney General specifically believed that the warrantless surveillance was entirely legal from its inception until its conclusion because it continued to have a foreign intelligence purpose. *See, e.g.*, AG Affidavit, ¶ 16; AG Testimony, pp. 20-22. Judge Bryan, who heard the testimony of the Attorney General, found this testimony to be convincing. *United States v. Hung, supra*, at 10. We find no reason to doubt that the Attorney General, or those acting under his authority, subjectively believed that they were acting within the bounds of the Constitution and Title III.

C. Reasonableness of Belief

In order for official acts to be protected by the cloak of qualified immunity, the official's subjective belief in the legality of his action must in fact be a reasonable one. We find there are several considerations which make it reasonable for the defendants to believe that the

surveillance of Truong Dinh Hung was legal from its inception to its conclusion.

First, the surveillance of Truong Dinh Hung was not in violation of any "clearly established" constitutional or statutory right. *See Procunier v. Navarette, supra,* at 564. The Supreme Court had expressly reserved judgment on whether a warrant is required for foreign intelligence surveillance directed at foreign powers or agents of foreign powers. *United States v. United States District Court,* 407 U.S. 297, 309 (1972) (*Keith*).[6] The Court of Appeals for this Circuit has also yet to determine whether a warrant is constitutionally required for the surveillance of foreign powers or agents of foreign powers. *See Zweibon v. Mitchell, supra* at 614. Several Circuit Court decisions, morover, have recognized that warrantless surveillance of a foreign agent may be constitutionally permissible. The Third Circuit found such surveillance constitutionally permissible but limited its holding to situations in which the "sole purpose" was the gathering of foreign intelligence. *United States v. Butenko,* 494 F.2d 593, 607 (3rd Cir. 1974) (*en banc*), *cert. denied sub nom., Ivanov v. United States,* 419 U.S. 881 (1974). The Ninth Circuit, however, did not impose a strict "purpose" limitation upon the warrant requirement when it issued the broad holding that "[f]oreign security wiretaps are a recognized exception to the general warrant requirement. . ." *United States v. Buck,* 548 F.2d 871,875 (9th Cir. 1977). *Accord, United States v. Brown,* 484 F.2d 418 (5th Cir. 1973), *cert. denied,* 415 U.S. 960 (1974).

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[6]The Supreme Court stated that "[w]e have not addressed, and express no opinion as to the issues which may be involved with respect to activities of foreign powers or their agents." *United States v. United States District Court, supra* at 321-22 (1972).

The applicabilit of Title III to foreign intelligence surveillance is an equally unsettled area of the law. Section 2511(3) of Title III specifies that the Act does not limit the President's power "to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities." 18 U.S.C. § 2511(3). The Supreme Court in *United States v. United States District Court, supra,* (*Keith*), held that " the Act simply did not legislate with respect to national security surveillance." *Id.* at 306. A plurality of this Circuit has held that a wiretap is *outside* the purview of the Act even if it is not "solely" designed to secure national security information. *See Zweibon v. Mitchell, supra,* at 612 n.39, 692 n.13. Neither *Keith* nor *Zweibon* provide any criteria for determining whether a warrantless surveillance of a foreign agent is *within* the purview of Title III.

In light of the unsettled state of the law pertaining to the warrant requirement for the surveillance of foreign agents, the Attorney General was clearly reasonable in his belief that a warrant is not required to initiate surveillance of suspected foreign agents. The existing law also provided no guiding principles for determining when the foreign intelligence justification for a warrantless surveillance lapsed into or combined with a prosecutorial or other purpose for which a warrant was required. The Attorney General therefore reasonably could conclude that it was permissible to conduct warrantless surveillance throughout the duration of the wiretap on Truong Dinh Hung.

The reasonableness of the defendants' conduct can also be viewed in light of the need to preserve the Attorney General's discretion to take measures to protect and promote governmental interests in the face of an unsettled body of constitutional and statutory law. The Attorney General is charged with the responsibility to formulate and

advocate interpretations of law. This responsibility can only be effectively exercised if the Attorney General is given assurances that he, and those acting under his authority, will not be held "liable for mere mistakes in judgment, whether the mistake is one of fact or one of law." *Butz v. Economou, supra,* at 4960. The discretion and responsibilities associated with the Office of Attorney General are therefore additional factors which made it reasonable for the defendants to conclude that the surveillance of Truong Dinh Hung was lawful.

IV. Declaratory Relief

Plaintiffs seek a declaratory judgment that the interception of plaintiffs' phone conversation with Hung were violations of the Fourth Amendment regardless of whether defendants are entitled to the defense of immunity. Plaintiffs correctly assert that a finding of qualified immunity only bars plaintiffs' claim for damages and would not preclude their claims for equitable declaratory relief. *National Treasury Employees Union v. Nixon,* 492 F.2d 587, 609 (D.C. Cir. 1974).

The general standard for the entry of a declaratory judgment is "whether the facts alleged, under all the circumstances, show that there is a substantial controversy between parties having adverse legal interests of such sufficient immediacy and reality" to warrant the issuance of a declaratory judgment. *Maryland Casualty Co. v. Pacific Coal and Oil Co.,* 312 U.S. 270, 273 (1941). More specifically, declaratory judgment is appropriate if the challenged government activity is "continuing" and "casts what may well be a substantial adverse effect upon the interests of the petitioning parties." *Super Tire Engineering Co. v. McCorkle,* 416 U.S. 115, 122 (1974). *See also Ellis v. Dysor,* 421 U.S. 426, 433 (1975). A second consideration in determining whether to issue a declaratory judg-

ment is whether the issue in question can be more properly resolved in another forum. *Hanes Corp. v. Millard*, 531 F.2d 585, 596 (D.C. Cir. 1976). Operating under the guidance of these standards, federal courts have the discretion to determine whether a declaratory judgment should be awarded. *Hanes Corp. v. Millard, supra,* at 591.

We first find that the challenged surveillance does not pose an immediate adverse threat to plaintiffs. The surveillance at issue in this litigation terminated at the time that the indictments of Hung and Humphrey were returned. *See* AG Affidavit ¶ 16. There is nothing in the complaint or in the circumstances which gave rise to the surveillance of Truong Dinh Hung to indicate that there is a reasonable likelihood that there will be a future warrantless wiretap during which the plaintiffs will be incidentally overheard.

The recent action of the Congress also makes this a particularly inappropriate case for a declaratory judgment. On October 25, 1978, it passed the Foreign Intelligence Surveillance Act of 1978, Pub.L.No. 95-511, 92 Stat. 1788, 50 U.S.C. § 1801. This Act specifies in elaborate detail the procedures which are to be followed for conducting electronic surveillance within the United States for foreign intelligence purposes. These procedures will apply to future electronic surveillances, such as that at issue in this case, where the Attorney General authorizes the surveillance of suspected foreign agents. A declaration of the validity *vel non* of the surveillance at issue in this action would therefore provide no guidance to federal officials in the future surveillance of suspected foreign agents.

Furthermore, the precise constitutional and statutory issues raised here are currently being litigated. The Fourth Circuit Court of Appeals has before it the appeal of Judge Bryan's ruling in *United States v. Hung, supra,* regarding

the legality of the surveillance of Truong Dinh Hung. To the extent that it is necessary to have a determination of the constitutionality of this surveillance, we find that the Fourth Circuit Court of Appeals is the appropriate forum and deny plaintiffs' motion for declaratory relief.

An order consistent with this opinion has been entered this day.

/s/ J.H. Pratt

John H. Pratt
United States District Judge

January 29th, 1979.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JACQUELYN M. CHAGNON, *et al.*,	)	
	)	
Plaintiffs,	)	
vs.	)	Civil Action
	)	No. 78-646
GRIFFIN BELL, *et al.*,	)	
	)	
Defendants.	)	

ORDER

Upon consideration of defendants' motion to dismiss or in the alternative for summary judgment, plaintiffs' opposition thereto, plaintiffs' motion for partial summary judgment, defendants' opposition thereto, and upon consideration of the entire record in this action, it is this 29th day of January, 1979,

ORDERED, that defendants' motion for summary judgment be and hereby is granted on the ground, *inter alia,* that the defendants are entitled to qualified immunity from liability for damages; and it is

ORDERED, that plaintiffs' motion for partial summary judgment on the right to declaratory relief be, and hereby is, denied; and it is further

ORDERED, that this action be and hereby is dismissed.

/s/ John H. Pratt
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JACQUELYN M. CHAGNON, *et al.*,	)	
	)	
Plaintiffs,	)	
vs.	)	Civil Action
	)	No. 78-646
GRIFFIN BELL, *et al.*,	)	
	)	
Defendants.	)	

ORDER

Upon consideration of the federal defendants' motion for a protective order staying discovery until a determination is made on their Motion to Dismiss or in the Alternative for Summary Judgment, and the matters submitted in support of and in opposition to that motion, and the Court having concluded that the motion should be granted, it is hereby

ORDERED that the motion is granted, and it is further

ORDERED that all discovery in this action shall be stayed until a decision is rendered on Defendants' Motion to Dismiss or in the Alternative for Summary Judgment.

Date: 17 August, 1978

/s/ J. H. Pratt
United States District Judge

APPENDIX F

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. Title III of the Omnibus Crime Control and Safe Streets Act of 1968 provides in pertinent part:

> § 2511. Interception and disclosure of wire or oral communications prohibited.
>
> (1) Except as otherwise specifically provided in this chapter any person who—
>
> > (a) willfully intercepts, endeavors to intercept, or procures any other person to intercept, or endeavor to intercept, any wire or oral communication;
> >
> > * * *
> >
> > (c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * *

(3) Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercises of the foregoing powers may be received in evidence in any trial, hearing, or other proceeding only where such interception was

reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.[1]

* * *

§ 2516. Authorization for Interception of Wire or Oral Communications.

(1) The Attorney General or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communication by the Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of (a) any offense punishable by death or by imprisonment for more than one year under . . . the following chapters of this title: chapter 37 (relating to espionage) . . .

* * *

§ 2518. Procedure for Interception of Wire or Oral Communications.

* * *

(5) . . . Every order and extension thereof shall contain a provision that the authorization to intercept. . . shall be conducted in such a way as to minimize the interception of communications not otherwise subject

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[1] 18 U.S.C. § 2511(3) was repealed by Section 301(c) of the Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1797, which was enacted on October 25, 1978 following the events which gave rise to this litigation. 50 U.S.C. § 1801 (note).

to interception under this chapter, and must terminate upon attainment of the authorized objective or in any event in thirty days.

* * *

§ 2520. Recovery of Civil Damages Authorized.

Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person—

(a) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;

(b) punitive damages; and

(c) a reasonable attorney's fee and other litigation costs reasonably incurred.

A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter or under any other law.

No. 80-1148

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ALEXANDER L. STE
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

JACQUELYN M. CHAGNON, ET AL., PETITIONERS

v.

GRIFFIN BELL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

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QUESTION PRESENTED

Whether the Attorney General and officials of the Federal Bureau of Investigation acting at his direction were correctly granted summary judgment on grounds of qualified immunity with respect to a claim of personal damages liability arising from the authorization and conduct of a national-security wiretap of a foreign agent.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1148

JACQUELYN M. CHAGNON, ET AL., PETITIONERS

v.

GRIFFIN BELL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is not yet reported. The opinion of the district court (Pet. App. 37a-49a) is reported at 468 F. Supp. 927.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 1980 (Pet. App. 36a). On November 6, 1980, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including December 12, 1980, and on December 3, 1980, the Chief Justice granted a further extention to and including January 11, 1981. The petition for a writ of certiorari was filed on January 10, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In a complaint filed on April 11, 1978, petitioners alleged that their conversations with one Truong Dinh

Hung (who is not a party to this litigation) were incidentally overheard in the course of a national-security wiretap that had been conducted on the home telephone of Truong, who was a foreign agent engaged in espionage against the United States. Petitioners sought monetary and equitable relief under the Fourth Amendment and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.* Named as defendants in their individual and official capacities were Attorney General Griffin B. Bell, former FBI Director Clarence M. Kelley, Associate FBI Director and former Acting FBI Director Richard Held, and FBI Special Agent William Fleshman, Jr. (Pet. App. 2a, 5a-6a).

In early May 1977, Attorney General Bell was advised by FBI Director Kelley and Deputy Secretary of State Warren Christopher that there had occurred a serious breach of security involving the unauthorized disclosure of classified State Department documents to representatives of a hostile foreign government. The Attorney General was further informed that Truong Dinh Hung, who was known not to be a citizen of the United States, had been the focus of a joint FBI-CIA counterintelligence investigation directed at suspected agents of the Socialist Republic of Vietnam (SRV). On a number of recent occasions, during the time of the 1977 Paris negotiations between the SRV and the United States, Truong had used an undercover FBI-CIA courier to deliver packages to, and to bring back materials from, North Vietnamese representatives in Paris, France. In addition, federal agents had found classified State Department documents in a package that Truong sent to Paris. By May 6, 1977, the FBI was convinced that Truong was an SRV intelligence agent. Officials of the Department of State considered the compromise of classified documents to be "a very grave problem" (Pet. App. 7a) and expressed their concern that these breaches of security could prejudice the relations of the United States with foreign countries and

could identify and endanger individuals who were supplying information to the United States (*id.* at 6a-7a; *United States* v. *Truong Dinh Hung*, 629 F. 2d 908, 911 (4th Cir. 1980)).

On the basis of these reports, Attorney General Bell concluded that Truong was part of a network of SRV agents. In addition, the Attorney General found that "[i]t was imperative * * * to determine the extent of the material already compromised, the source of the materials within this Government, the identity and scope of Truong's intelligence network, and the extent of this network's activities" (Pet. App. 7a). Accordingly, acting pursuant to a written delegation of authority from the President, the Attorney General authorized a wiretap of Truong's telephone on May 9, 1977 (*id.* at 7a, 21a, 22a).

In line with the Attorney General's established practice concerning counterintelligence investigations, no judicial warrant was sought for the Truong wiretap. The decision to proceed with the warrantless surveillance was based on the Attorney General's conclusion that a court order was not required where, as here, it was believed that the subject of the surveillance was an agent of a foreign power and the purpose of the surveillance was to protect national-security information from foreign intelligence activities and to obtain foreign intelligence information, including counterintelligence information, deemed essential to the security of the United States (Pet. App. 7a, 8a; C.A. App. 25).[1]

The wiretap of Truong's telephone commenced on May 11, 1977. In August and November of 1977, the Attorney General authorized 90-day extensions of the wiretap. The surveillance continued until January 31, 1978, when, as a

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[1]Petitioners acknowledge that the wiretap was initiated and conducted in full accordance with applicable Executive Orders and Department of Justice guidelines (Pet. App. 24a n.23, 25a n.25).

result of the foreign intelligence investigation, an indictment charging espionage and other offenses was returned in the Eastern District of Virginia against Truong and Ronald Humphrey, an official of the United States Information Agency (Pet. App. 8a).[2]

2. In the district court, respondents moved to dismiss or, in the alternative, for summary judgment. This motion was supported by the direct and cross-examination testimony of Attorney General Bell at the suppression hearing in the criminal case, his affidavit in that case, and the opinion denying the motion to suppress (Pet. App. 10a-12a).[3]

Finding that there were "no genuine issues of material fact" (Pet. App. 38a), the district court granted respondents'

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[2]Prior to their trial, Truong and Humphrey moved to suppress all evidence obtained as a result of the Truong wiretap. Among the witnesses at the evidentiary hearing on the motion to suppress was Attorney General Bell, who testified as to the reasons, purposes, and authority for the electronic surveillance. The district court held that the warrantless wiretap had been justified under the "foreign agent" exception to the warrant requirement of the Fourth Amendment because the wiretap had been approved by the Attorney General pursuant to authority delegated to him by the President, had been directed against an agent of a foreign power, and had been undertaken for purposes of foreign intelligence or counterintelligence. The court also concluded that the wiretap had been conducted in a reasonable manner between its inception and July 20, 1977. However, the court found that a warrant was required by July 20 because the primary focus of the surveillance had shifted from counterintelligence to criminal prosecution. Based on that finding, and without considering the reasonableness of the way in which the combined counterintelligence-prosecutorial wiretap was conducted after July 20, the court ordered the suppression of evidence obtained from the wiretap subsequent to July 20, 1977. See *United States* v. *Humphrey*, 456 F. Supp. 51, 55-60 (E.D. Va. 1978). On the defendants' appeal from their convictions on espionage and other charges, the court of appeals affirmed the district court's ruling on the legality of the wiretap. See *United States* v. *Truong Dinh Hung*, *supra*, at 912-917.

[3]Respondents also sought a protective order to stay discovery pending resolution of their motion for summary judgment. The district court granted this stay of discovery (Pet. App. 11a)..

motion for summary judgment (*id.* at 42a-47a, 50a). Noting the "[a]bsen[ce of] a good faith allegation by [petitioners] that the Attorney General or those acting under his authority were motivated by malice toward Truong Dinh Hung" (*id.* at 43a), the court concluded that the wiretap "was not in violation of any 'clearly established' constitutional or statutory right" (*id.* at 45a) and therefore that respondents were entitled to qualified official immunity.[4]

3. The court of appeals unanimously affirmed (Pet. App. 1a-35a). It found that "[w]hether evaluated by reference to Supreme Court and other judicial precedent, to presidential practice, or to then existing congressional legislation, the state of the law with respect to electronic surveillance of foreign agents of foreign powers was, at best, unsettled in 1977-1978, the period of the Truong wiretap" (*id.* at 17a). Thus, the court rejected petitioners' contention that the surveillance was objectively unreasonable because it was improperly initiated, because it was impermissibly continued after the primary purpose had become prosecutorial, and because it was inadequately minimized (*id.* at 23a-26a).[5]

In addition, the court of appeals found that petitioners had raised "no actual claim that the Attorney General acted with malicious motivations" (Pet. App. 29a) and that "even granting all inferences and resolving all disputes in the [petitioners'] favor, no reasonable person could infer that the Attorney General had acted with malicious intent" (*id.*

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[4]Because it granted respondents' motion for summary judgment based on qualified immunity, the district court found it unnecessary to decide either the legality of the wiretap in this case (Pet. App. 42a) or the availability of an absolute-immunity defense (*id.* at 43a n.4).

[5]Like the district court, the court of appeals did not decide, but simply assumed for purposes of its decision, that the Truong wiretap was in fact unlawful (Pet. App. 13a, 15a, 23a, 26a, 28a).

at 30a).[6] On this basis, the court concluded that summary judgment was appropriate because petitioners' asserted issues of disputed fact involved merely "claim[s] of mistake—that the Attorney General 'knew or should have known' of the illegality of the Truong wiretap" (*id.* at 29a)—which, in the absence of malice and in light of the unsettled nature of the law at the time (*id.* at 17a), failed "to raise an issue material to the immunity question" (*id.* at 26a).[7]

ARGUMENT

1. Petitioners principally contend (Pet. i) that respondents should have known that the Truong wiretap violated the warrant and minimization requirements of the Fourth Amendment and that the courts below erred in concluding that the law was not "clearly established" in these areas in 1977-1978. These issues, which involve only the determination of the state of the law at a prior time, do not merit this Court's review. Furthermore, in the future, issues regarding warrants and minimization in foreign national-security wiretaps will be governed by the Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783, 50 U.S.C. (Supp. II) 1801 *et seq.*, which was adopted after the termination of the Truong surveillance. As the court of appeals observed (Pet. App. 5a):

> [A] number of the matters at issue here are specifically addressed in the Foreign Intelligence Surveillance Act of 1978, * * * which Congress enacted after the events

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[6]The court also determined that respondents "have demonstrated in the record, without contradiction, that their actions were taken in good faith" (Pet. App. 30a n.27) and that they had met any burden imposed on them by Fed. R. Civ. P. 56(c) " 'to show initially the absence of a genuine issue concerning any material fact,' granting all favorable inferences to the party opposing the motion" (Pet. App. 31a-32a).

[7]Likewise, since petitioners' discovery requests related only to issues that "were immaterial to the immunity questions" (Pet. App. 34a), the court of appeals sustained the district court's stay of discovery (*ibid.*).

> giving rise to this litigation. It is therefore unlikely that a case of this nature, involving the precise issues here raised, will arise again at any time in the near future.

Hence, the petition should be denied because it presents no issue of continuing legal significance.[8]

2. In addition, petitioners fundamentally misapprehend the nature of the decision in this case. Contrary to suggestions throughout the petition (*e.g.*, Pet. 9, 10, 12-13), the court of appeals did not resolve the Fourth Amendment requirements for warrants and minimization in foreign intelligence wiretaps. Rather, it held that, even assuming in petitioners' favor that the Truong wiretap was unlawful (see note 5, *supra*), the surveillance in 1977-1978 "violated no clearly established constitutional right" (Pet. App. 5a). Therefore, the case presents no substantive constitutional questions for consideration by this Court.

3. At all events, the court of appeals, in a lengthy opinion upon which we rely, correctly upheld the district court's grant of summary judgment to respondents on the ground of qualified immunity. Moreover, the decision below does not conflict with any decision of this Court or the other courts of appeals. Accordingly, further review is unwarranted.[9]

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[8]Petitioners suggest (Pet. 7, 10-11) that the decision below somehow will undermine the provisions of the Foreign Intelligence Surveillance Act. This suggestion is unfounded. The Act unquestionably is inapplicable to this litigation, and the court of appeals expressly noted (Pet. App. 35a) that "[w]hether or not the acts complained of here might be subject to different treatment under the Foreign Intelligence Surveillance Act is a matter that need not occupy us in this case." There will be time enough in the future to consider the requirements of the Act in a case, unlike this one, that arises under the statute.

[9]We note that petitioners have not challenged the court of appeals' holding (Pet. App. 10a-11a n.9) that the FBI officials sued in this case are entitled to derivative immunity based on the official immunity of the Attorney General.

a. The court of appeals correctly held that the allegedly inadequate minimization in the Truong wiretap did not constitute a violation of clearly established law (Pet. App. 25a-29a). As we discuss in the Brief for Petitioners at 52-55, 58, *Kissinger* v. *Halperin*, No. 79-880 (argued Dec. 8, 1980),[10] no settled Fourth Amendment requirement for minimization of national-security surveillance has been developed, and certainly none existed during the period May 1977-January 1978 when the Truong wiretap was conducted. See also *Sinclair* v. *Kliendienst*, No. 79-2010 (D.C. Cir. Mar. 9, 1981), slip op. 3-4, 9. Indeed, no court had specifically addressed the standard for minimization applicable to national-security wiretaps until the district court in 1978 considered this very wiretap in the related criminal prosecution of Truong and Humphrey (see page 4 & note 2, *supra*).[11] The absence of clearly established law was particularly evident for the kind of wiretap involved in this case—a foreign national-security wiretap of a foreign citizen acting as an agent of a hostile government.[12]

For these reasons, the court of appeals correctly concluded that the minimization requirement for foreign

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[10]Counsel for petitioners in the instant case also represent the respondents in *Kissinger* v. *Halperin*.

[11]We also note that the minimization standard applicable to wiretaps in traditional criminal investigations—which is a more stringent standard than that applicable to national-security wiretaps (see *United States* v. *United States District Court*, 407 U.S. 297, 322-323 (1972))—was substantially clarified by this Court in *Scott* v. *United States*, 436 U.S. 128 (1978). In *Scott*, no effort was made to minimize the interception of telephone calls (*id.* at 133-134), but the Court concluded that the surveillance could nonetheless be reasonable in light of such factors as, in the present case, the extensiveness of the targeted activity and the use of a private rather than a public telephone (*id.* at 140).

[12]None of the cases relied on by petitioners (Pet. 8-9) involved a foreign intelligence surveillance of a foreign agent who was not a United States citizen.

national-security surveillance was not clearly established at the time of respondents' acts.

b. Petitioners next contend (Pet. 11-13) that respondents should have known that the Fourth Amendment required a warrant both for the initiation of the wiretap when the primary purpose of the surveillance concededly was to obtain foreign intelligence, and for the continuation of the wiretap when and if the prosecutorial purpose of the surveillance began to predominate over the counterintelligence purpose. However, as set out in the Brief for Petitioners at 55-59, *Kissinger* v. *Halperin, supra*, this Court in *Katz* v. *United States*, 389 U.S. 347, 358 n.23 (1967), and *United States* v. *United States District Court*, 407 U.S. 297, 308-309, 321-322 (1972), had expressly left open the question of a warrant requirement for foreign national-security surveillance, and several courts of appeals had held that a warrant was not required for such surveillance. See aslo *Sinclair* v. *Kliendienst, supra,* slip op. 8-9. And, as the court below recognized (Pet. App. 25a-26a n.25), there was neither a "clearly established" requirement that a warrant be obtained for a wiretap that had the "parallel" purposes (*id.* at 9a) of counterintelligence and prosecution nor a "clearly established" standard for determining what in fact was the primary purpose of the surveillance.[13]

Petitioners argue (Pet. 12-13) that a warrant requirement was established for all wiretaps, including foreign intelligence wiretaps of foreign agents, by the plurality opinion in *Zweibon* v. *Mitchell*, 516 F. 2d 594, 651 (D.C. Cir. 1975) (en banc), cert. denied, 425 U.S. 944 (1976) (*Zweibon I*). However, *Zweibon I* "hold[s] * * * only that a warrant must be obtained before a wiretap is installed on a domestic organization that is neither the agent of nor acting in collaboration

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[13]In addition, the record shows that at all times the Truong wiretap was part of a foreign security investigation that never lost its counterintelligence purpose. See, *e.g.*, Pet. App. 8a, 9a, 22a, 31a, 44a.

with a foreign power * * * "(516 F. 2d at 614; see also *id.* at 651). Furthermore, the court of appeals in this case concluded (Pet. App. 18a-20a) that its earlier decision in *Zweibon I* did not "clearly establish" a warrant requirement for foreign security surveillance or put respondents on notice that the Truong wiretap was unlawful. At most, then, the asserted conflict between the decision below and *Zweibon I* is in the nature of an intra-circuit conflict that does not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

c. There is also no merit to petitioners' final claim (Pet. 13-15) that summary judgment was improperly granted to respondents on the ground of qualified immunity. This narrow issue, which was resolved against petitioners by both courts below, does not justify further review.

In any event, the court of appeals correctly sustained summary judgment in this case. In light of the unsettled state of the law on foreign national-security wiretaps, and in the absence of an "actual claim that the Attorney General acted with malicious motivations" (Pet. App. 29a; see also *id.* at 43a), there were no genuine issues of material fact with respect to respondents' qualified immunity defense. Even now, petitioners have identified only two issues, both involving allegations of recklessness, that in their view served to preclude the grant of summary judgment (Pet. 15). However, because the law was not clearly established and respondents' actions were objectively reasonable, these assertions that respondents " 'knew or should have known' " that the Truong wiretap was unlawful (Pet. App. 29a) do not raise a disputed question of fact relevant to the motion for summary judgment based on qualified immunity.

Summary judgment in this case comported with the Court's admonition in *Butz* v. *Economou*, 438 U.S. 478, 508 (1978), that claims against federal officials for damages "can be terminated on a properly supported motion for summary judgment based on the defense of

immunity. * * * [F]irm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits." Here, respondents' motion for summary judgment was supported by "detailed and non-conclusory" submissions (Pet. App. 31a) consisting of the Attorney General's affidavit and testimony in the related criminal case and the district court's opinion denying the defendants' motion to suppress in that case. The record presented "an essentially uncontested picture of a high-level federal official required to act outside the zone of safely settled constitutional doctrine in a matter he viewed as posing an urgent threat to national security" (*ibid.*). In these circumstances, qualified immunity for respondents was appropriate to ensure that "[f]ederal officials * * * not be liable for mere mistakes in judgment, whether the mistake is one of fact or one of law" (*Butz* v. *Economou, supra,* 438 U.S. at 507), and "to forestall an atmosphere of intimidation that would conflict with their resolve to perform their designated functions in a principled fashion." *Ferri* v. *Ackerman,* 444 U.S. 193, 204 (1979).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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